IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD GRAZIANO,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
JAMES L. GRACE,	:	
SUPERINTENDENT, et al.,	:	NO. 05-2300
Respondents.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE April 29, 2008

Before the Court for Report and Recommendation is Petitioner Edward Graziano's (alternatively "Graziano" or "Petitioner") *pro se* amended petition for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, along with the counseled reply brief to the District Attorney's responsive pleading. Graziano is presently incarcerated at the State Correctional Institute in Camp Hill, Pennsylvania.[1] In his petition, he raises Sixth Amendment issues pertaining to the ineffectiveness of counsel at virtually every stage of the proceedings, along with several claims alleging due process violations. For the reasons set forth below, we find that the petition is without merit and recommend that it be denied.[2]

[1] At the time of his initial filing, Petitioner was incarcerated at SCI Huntingdon. He was subsequently transferred to SCI Camp Hill, and alerted us to this fact in a letter dated September 24, 2006. (Doc. 35). Although both SCI Huntingdon and SCI Camp Hill are in the Middle District of Pennsylvania, venue here is proper in that Petitioner's current confinement grew out of a prosecution and conviction in Philadelphia County.

[2] In preparing this Report and Recommendation, we reviewed the documents filed in the Eastern District of Pennsylvania including the Petitioner's form Petition for Writ of Habeas Corpus (Doc. 1), the District Attorney's Response to the Petition for Writ of Habeas Corpus (Doc. 8), Petitioner's first "Supplement Petition of Writ of Habeas Corpus (Doc. 13), Petitioner's second "Supplement Petition of Writ of Habeas Corpus" (Doc. 15), Petitioner's Amended

(continued...)

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 7, 1992, Petitioner was convicted of first-degree murder, possession of an instrument of crime, and violation of Pennsylvania's Uniform Firearms Act following a jury trial before the Honorable Ricardo C. Jackson that commenced on March 27, 1992. (Am. Pet. Mem. at 2; Am. Resp. at 2). A penalty phase followed and the jury returned a verdict of life imprisonment on April 8, 1992. (Am. Pet. Mem. at 2; Am. Resp. at 2). In addition to the life sentence, Judge Jackson sentenced Petitioner to consecutive terms of two and one-half to five years imprisonment on the weapons charges. (Am. Pet. Mem. at 4; Am. Resp. at 2).

The conviction stemmed from a shooting that occurred in the early morning hours of August

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[2](...continued)
Petition for Writ of Habeas Corpus ("Am. Pet.") (Doc. 18), the Memorandum of Law ("Am. Pet. Mem.") (Doc. 23) and the Appendix of exhibits in support thereof ("Am. Pet. Appx."), the District Attorney's Response to the Petition for Writ of Habeas Corpus "(Resp.") (Doc. 8), the Response to Petitioner's Memorandum in Support of Amended Petition for Writ of Habeas Corpus ("Am. Resp.") (Doc. 29), Petitioner's counseled "Reply Brief to Government's Motion to Dismiss" ("Rep. Br.") (Doc. 44) and the Supplement thereto ("Rep. Br. Supp.") (Doc. 45). We also reviewed relevant state court documents appended to these various pleadings, including Judge Jackson's denial of Graziano's post-trial motion for new trial (*Commonwealth v. Graziano*, No. 3077 Philadelphia 1993, "Post-trial Mot.," *in* Am. Resp. at Ex. A), Graziano's brief on direct appeal to the Pennsylvania Superior Court ("Dir. App. Br.," *in* Am. Resp. at Ex. G), the Superior Court's May 31, 1995 rejection of Graziano's direct appeal (*Commonwealth v. Graziano*, No. 3077 Philadelphia 1993, "Graziano I," *in* Am. Pet. Appx. Ex. I), Graziano's brief in support of his Petition for Allowance of Appeal of the Superior Court's 1995 decision to the Pennsylvania Supreme Court ("Pet. All. App.," *in* Am. Pet. Appx. Ex. H), the Superior Court's October 12, 2000 first disposition of Graziano's collateral appeal (*Commonwealth v. Graziano*, No. 3346 Philadelphia 1998, "Graziano II," *in* Am. Resp. at Ex. D), the post-conviction court's disposition of Graziano's remaining collateral appeal claims ("PCRA II," *in* Am. Resp. Ex. E), and the Superior Court's September 14, 2004 disposition of those same remaining collateral appeal claims (*Commonwealth v. Graziano*, No. 1886 EDA 2003, "Graziano III," *in* Am. Pet. Appx. Ex. G). Finally, we reviewed the notes of testimony from the trial and the post-trial proceedings, as well as videotape footage from the Biarritz which was admitted both at trial and during post-conviction proceedings. We were able to determine the identities of pertinent people on the tape by matching certain points in the footage to points contained within the testimony of witness Hope Myers.

15, 1991 after a brief encounter outside of what was formerly the Biarritz Club (the "Biarritz"), an after-hours nightclub located at 1415 Locust Street in Philadelphia. (Am. Pet. Mem. at 12-14; Am. Resp. at 1). The encounter stemmed from an apparent disagreement between Petitioner and the 20 year-old victim, Dominic Jude Capocci ("Capocci"), over a young woman who had been dating Capocci, named Stephanie Marano.[3] (Am. Pet. Mem. at 12-14; Am. Resp. at 1). Petitioner had met Ms. Marano at a bar called the Aztec Club on the night of the shooting, where they danced and shared drinks. (Am. Pet. Mem. at 12-14; Am. Resp. at 1). These two eventually made their way separately to the Biarritz, where Ms. Marano interacted with both Capocci and Graziano, before the three ultimately spilled out onto the street when the bar closed. (Am. Pet. Mem. at 13-14; Am. Resp. at 1). After closing, and while Petitioner was standing on the northeast corner of the intersection of 15th and Locust Streets talking to Ms. Marano, Capocci approached, with two of his friends close behind, to speak to Ms. Marano. (Am. Pet. Mem. at 14; Am. Resp. at 1, 6). As Capocci was speaking with Ms. Marano, Petitioner stepped back, drew a gun from the waistband of his sweat-pants and fired, killing Capocci with a single shot between the eyes. (Am. Pet. Mem. at 14; Am. Resp. at 1, 6). Petitioner then fled the scene on foot and hailed a taxi cab home. (Am. Pet. Mem. at 14-16; Am. Resp. at 6-7). The same morning he made his way to the Newark airport, disposed of the weapon along the way (N.T. 4/2/92 at 105), and caught a flight to Florida. (Am. Pet. Mem. at 15-16; Am. Resp. at 7). He was finally arrested in Florida by the FBI some two weeks later. (Am.

[3] Although the notes of testimony spell her last name "Marino" at various points, the parties spell her last name "Marano." In writing this Report, we have accepted the parties' spelling of her name.

Pet. Mem. at 16; Am. Resp. at 7).[4]

At trial, where Petitioner was represented by Joseph P. Grimes, Esquire, Graziano testified on his own behalf. He told the jury that he had only been holding the gun as a favor for a friend, that he did not intend to shoot the victim, that he had become fearful of his own safety as the victim and his friends approached, and that one of the friends pulled up his shirt as if to pull out a weapon. (Am. Pet. Mem. at 13; Am. Resp. at 2; N.T. 4/2/92 at 83-84). He also testified that Ms. Marano warned, "[h]ere they come, watch it. I think they are going to do something" as Capocci and his friends approached.[5] (N.T. 4/2/92 at 83-85). He further testified that at that point he "stepped back and pulled out the gun to scare them away, to make them step back." (N.T. 4/2/92 at 84; Am. Pet. Mem. at 2; Am. Resp. at 2). While admitting that he pointed the gun in Capocci's direction, he initially denied pulling the trigger and claimed that the gun discharged accidentally, (N.T. 4/2/92 at 86, 92, 95; Am. Pet. Mem. at 2; Am. Resp. at 2), but on cross-examination conceded that his finger was on the trigger when he drew the gun from his waistband and that the accident must have occurred with his finger pulling the trigger. (*See* N.T. 4/2/92 at 143-44) (Q. So accidentally the safety came off, accidentally your finger is on the trigger . . . ? A. Right.; Q. Accidentally, accidentally the trigger must have gotten pulled. Do you agree with me on that? A. Yeah, I agree.). He also testified that the distance between himself and the victim was only about five or six feet. (*Id.* at 113-14).

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[4] A more comprehensive version of the factual background can be found in the parties' briefings. (*See* Am. Pet. Mem. at 1-2, 12-16; Am. Resp. at 5-7).

[5] When asked on cross-examination, Ms. Marano denied making such a statement and testified that she only said "why don't you leave now" to Petitioner, to which Petitioner responded, "no, don't worry about it." (N.T. 3/30/92 at 74, 36).

The Commonwealth presented testimony from eyewitnesses to the shooting, including Ms. Marano. She confirmed that she had been recently dating the victim but had been talking to Petitioner throughout the night, and was talking to him outside the Biarritz after it closed. (N.T. 3/30/92 at 31). She stated that at this point the victim approached her, and minutes later, while she was speaking to him, Petitioner took a step back, drew his gun, extended his arm toward Capocci and fired, hitting him with a single shot to the forehead and between the eyes. (*Id.* at 31-34). She also testified that no one had threatened or attempted to harm Petitioner before the shooting. (*See, e.g., id.* at 33, 82-85). Her general account was corroborated by three other eyewitnesses: Derek Iovacchini (*see, e.g.*, N.T. 3/27/92 at 110-116), Anthony Spina (*see, e.g.*, N.T. 3/31/92 at 4-5, 25-26) and Anthony Pacitti (*see, e.g.*, N.T. 4/1/92 at 95-102).

The prosecution also offered evidence from Ms. Marano that at one point earlier in the evening Capocci had expressed some displeasure with her associating with Petitioner. (N.T. 3/30/92 at 20). When asked why, she explained that Capocci had told her that Petitioner was a drug dealer. (N.T. 3/30/92 at 20). Attorney Grimes immediately objected and moved for a mistrial. (N.T. 3/30/92 at 20-22). Judge Jackson denied the motion, but sustained the objection and issued two curative instructions telling the jury that they were to disregard the comment. (N.T. 3/30/92 at 22-26). Attorney Grimes then moved to question the witness as to whether she had informed the District Attorney or any other authorities of the purported statement from Capocci, and to question the individual jurors as to whether they could follow the curative instruction. (N.T. 3/30/92 at 21-22, 24). The first motion was apparently abandoned after an off-the-record conversation with the District Attorney. (N.T. 3/30/92 at 22-23). The second was denied. (N.T. 3/30/92 at 25).

The Commonwealth also presented the testimony of the Assistant Medical Examiner, Dr.

Bennett Preston, who testified, based on his examination of the forensic evidence, that the shooting was consistent with eyewitness testimony that the gunshot wound was either a "contact wound" or was sustained as a result of a close range shot from just a few feet away. (N.T. 4/1/92 at 67-69). He stated, however, that he was unable to testify about the precise distance from which the shooting occurred. (N.T. 4/1/92 at 67). He also conceded, on cross-examination, that the wound "could have also been a distant wound" and that in his forensic report he had concluded that "[the] amount of gunpowder is insufficient to demonstrate a contact wound and is of otherwise indeterminate significance." (N.T. 4/1/92 at 74-75).

Dr. Preston also testified that Capocci had a blood alcohol content level of .17, and that, in his professional opinion, a person at that level of intoxication would not be "quick acting or aggressive." (N.T. 4/1/92 at 71). On cross-examination, however, the doctor testified that a person with a blood alcohol content level of .14 and above would "be moving towards coma and drowsiness, the guy will have a buzz on and be mellow," but conceded that he had not viewed any evidence in the case consistent with his opinion that Capocci would have been in a "mellow" state. (N.T. 4/1/92 at 78-80).

To counter Petitioner's assertion that he had merely been holding the gun as a favor to a friend, that he was generally unfamiliar with guns, and that the gun had discharged by accident, the Commonwealth presented the testimony of Steven DeMarco, who managed the Biarritz on the night of the shooting and for at least several previous months prior. Mr. DeMarco testified that about six months prior to the shooting, he had confiscated a gun from Petitioner. (N.T. 4/3/92 at 25-26). This evidence was admitted for the limited purpose of impeaching Petitioner's testimony that he had only come into possession of the gun as a favor to a friend and that the actual shooting had been an

accident. Judge Jackson instructed the jury that they could consider this evidence for that limited purpose only. (N.T. 4/6/92 at 18).

After sentence was imposed, Mr. Grimes withdrew from Petitioner's case and Jack Meyers, Esquire entered his appearance. (Am. Pet. Mem. at 2; Am. Resp. at 2). Mr. Meyers timely raised a number of claims of ineffective assistance of trial counsel and trial court errors. (Am. Pet. Mem. at 2-4; Am. Resp. at 2). Judge Jackson rejected these claims, and on September 10, 1993, denied Petitioner's motion for a new trial. (Am. Pet. Mem. at 4; Am. Resp. at 2).

Petitioner then retained F. Emmet Fitzpatrick, Esquire. Mr. Fitzpatrick appealed the judgment to the Superior Court, alleging trial court error in permitting DeMarco's testimony concerning Petitioner's prior possession of the semi-automatic handgun, in denying a motion for mistrial upon Ms. Marano's testimony that the victim had told her that Petitioner was a drug dealer, and in allowing a reference to Petitioner's police photo number. (Am. Pet. Mem. at 4-5; Am. Resp. at 8). He also alleged ineffective assistance of trial counsel due to a failure to object or move for a mistrial in response to certain evidence, and that there was insufficient evidence to sustain the first-degree murder verdict. (Am. Pet. Mem. at 4-5; Am. Resp. at 8). On May 31, 1995, the Superior Court rejected these arguments and affirmed the judgments of sentence. (Am. Pet. Mem. at 5; Am. Resp. at 3). On October 24, 1995, the Supreme Court denied his petition for allowance of appeal. (Am. Pet. Mem. at 5; Am. Resp. at 3).

On January 14, 1997, Petitioner filed a timely *pro se* petition seeking relief under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). (Am. Pet. Mem. at 5). Patricia Dugan, Esquire, who was appointed to represent him, filed an amended petition alleging error on the part of the trial court and ineffective assistance of all previous counsel. (Am.

Pet. Mem. at 5-6; Am. Resp. at 3). On September 11, 1998, Judge Jackson, sitting as the PCRA court, issued a notice of intent to dismiss the petition without a hearing. (Am. Pet. Mem. at 6; Am. Resp. at 3). Burton A. Rose, Esquire then entered his appearance on Petitioner's behalf and filed an application to vacate the dismissal notice with leave to submit an amended petition. (Am. Pet. Mem. at 6; Am. Resp. at 3). Judge Jackson dismissed this application and the petition was denied on October 1, 1998. (Am. Pet. Mem. at 6; Am. Resp. at 3).

Still represented by Mr. Rose, Petitioner appealed the dismissal to the Superior Court on October 26, 1998. (Am. Pet. Mem. at 6; Am. Resp. at 3). In an order dated October 12, 2000, the Superior Court affirmed the PCRA court's rejection of Petitioner's ineffectiveness claim concerning trial counsel's failure to seek a jury instruction regarding homicide by misadventure (Graziano II at 8, *in* Am. Resp. at Ex. D), but reversed the court's refusal to permit Graziano to amend his petition to include claims that trial counsel (as well as all intervening counsel) was ineffective for not objecting to certain alleged instances of prosecutorial misconduct (Graziano II at 3-5, *in* Am. Resp. at Ex. D) and for failing to present testimony from an independent forensic pathologist to impeach Dr. Preston. (Graziano II at 3-5, *in* Am. Resp. at Ex. D). The proposed testimony was to address the question of the distance from which the fatal bullet was fired as well as Capocci's alleged passivity at the time of the shooting.

On June 27, 2002, the Honorable Stephen Geroff, sitting as a PCRA court, held an evidentiary hearing on these new claims. (Am. Pet. Mem. at 9; Am. Resp. at 4). At the hearing, Petitioner presented Dr. Mark Taff, a forensic pathologist, who testified on the forensic issues pertaining to the distance from which the fatal bullet was fired and Capocci's alleged passivity as it related to his blood alcohol level at the time of the shooting. (Am. Pet. Mem. at 9; Am. Resp. at

4). Trial counsel also testified at the hearing. (Am. Pet. Mem. at 9; Am. Resp. at 4). On June 3, 2003, Judge Geroff entered an order rejecting those claims and denying post-conviction relief. (Am. Pet. Mem. at 9; Am. Resp. at 4). On appeal, the Superior Court affirmed, and on February 24, 2005, the Pennsylvania Supreme Court denied discretionary review. (Am. Pet. Mem. at 9; Am. Resp. at 4).

On April 8, 2005, Petitioner filed a new *pro se* PCRA petition in state court raising a number of issues for the first time. (Am. Pet. Mem. at 10; Am. Resp. at 4). On January 17, 2006, the PCRA court issued a notice of intent to dismiss this new petition without a hearing as untimely filed. (Am. Pet. Mem. at 10; Am. Resp. at 4). The record does not reveal any further activity with respect to this appeal.

On March 11, 2005, before filing this second PCRA petition, Petitioner initiated the present habeas action, *pro se*, in the United States District Court for the Middle District of Pennsylvania. (Am. Pet. Mem. at 10; Am. Resp. at 4). The case was subsequently transferred to this district and Petitioner completed this Court's standard form for § 2254 habeas corpus petitions in April of 2005. (Doc. 1 at 11). On July 15, 2005, the District Attorney of Philadelphia County ("Respondent") filed a response to the petition, arguing that a number of the claims were not exhausted, and thus procedurally defaulted, and that those claims which had been exhausted were without merit. (Doc. 8). On September 9, 2005, Petitioner then filed a "Supplement Petition of Writ of Habeas Corpus" setting forth additional claims for relief. (Doc. 13). On October 16, 2005, Petitioner filed a second "Supplement Petition of Writ of Habeas Corpus" again setting forth additional claims for relief. (Doc. 15). On December 8, 2005, with leave from this Court, Petitioner filed an "Amended Petition for Writ of Habeas Corpus." (Doc. 18). On March 8, 2006, Petitioner filed a memorandum of law

in support of his amended petition. (Doc. 23). We address those issues raised in his Amended Petition and supporting memorandum.[6]

In this Amended Petition and the supporting memorandum, Petitioner sets forth claims which generally fall within the categories of due process violations and Sixth Amendment ineffective assistance of counsel claims. He alleges due process violations due to: (a) an unconstitutional mandatory instruction to the jury regarding intent; (b) the improper admission of evidence regarding a prior gun possession; (c) the improper denial of a motion for mistrial upon Ms. Marano's testimony

[6] Under 28 U.S.C. § 2242, a habeas petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Federal Rule of Civil Procedure 15 governs amended pleadings and under subsection (a)(2), a party may amend its complaint with the consent of the opposing party or with the court's leave. Once a party does so, however, it is well settled that the amended pleading supercedes and renders moot the initial complaint. This rule can be traced at least as far back as 1884, when the United States Supreme Court ruled that "[w]hen a petition is amended by leave of the court, the cause proceeds on the amended petition." *Washer v. Bullitt County*, 110 U.S. 558, 562 (1884). Lower courts have consistently followed this rule since. *See, e.g., New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1504 (3d. Cir. 1996) (citing *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985) and noting the "general principle that the amended complaint 'supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading'"); *Panton v. Matlack*, No. 06-0809, 2007 U.S. Dist. LEXIS 92003, *7 (M.D.Pa. Dec. 14, 2007) ("It is well-settled that an amended complaint supersedes the original complaint."); *Thompson v. Kramer*, Civ. A. No. 93-2290, 1994 U.S. Dist. LEXIS 17790, *34-35 (E.D.Pa. Dec. 13, 1994) ("[A]n amended complaint which makes no reference to the original complaint . . . replaces the original complaint."). This principle has been likewise applied in the habeas context, and thus an amended habeas petition supersedes the original petition. *See, e.g., Fisher v. Dyess*, No. 8:06-CV-2150-T-30EJ, 2007 U.S. Dist. LEXIS 24653, *1 (M.D.Fl. Apr. 3, 2007); *Crumbley v. Crosby*, No. 8:04-CV-427-T-30MAP, 2007 U.S. Dist. LEXIS 17447, *1 (M.D.Fl. Mar. 13, 2007); *Jones v. Kelly*, Nos. 96 Civ. 5678 & 03 Civ. 9750, 2004 U.S. Dist. LEXIS 2678, *1 (S.D.N.Y. Feb. 24, 2004); *Struble v. Michigan Dep't of Corrections*, No. 1:00-CV-676, 2000 U.S. Dist. LEXIS 17126, *1 (W.D.Mich. Nov. 14, 2002). Accordingly, in this report, we proceed only upon the claims raised in Graziano's Amended Petition and briefed in the accompanying memorandum of law. We are mindful, however, that "new ground[s] for relief supported by facts that differ in both time and type from those the original pleading set forth" raised within an amended habeas petition do not relate back to the original petition for purposes of the applicable statute of limitations, *Mayle v. Felix*, 545 U.S. 644, 650 (2005), and we proceed accordingly.

that the victim had told her that Petitioner was a drug dealer; and (d) insufficient evidence to support a first-degree murder verdict. (Am. Pet. at 2-3, 5). The Sixth Amendment claims assert the ineffectiveness of trial counsel for: (a) failing to request an instruction to the jury regarding "homicide by misadventure;" (b) failing to present the testimony of an expert forensic pathologist to establish that the victim's wound was not the result of a close-range shot and to establish that the victim's behavior at the time of the incident would have been neither mellow nor non-aggressive; and (c) failing to object to the "prosecutorial misconduct" in the prosecutor's closing arguments. (Am. Pet. at 3-5; Am. Pet. Mem. at 41). In his counseled Reply Brief, he also re-asserts an argument raised in his initial habeas petition that trial counsel was ineffective for failing to object to testimony from Commonwealth witnesses that they had identified Petitioner in police photographs. (Rep. Br. at 35). Finally, he alleges that appellate counsel was ineffective to the extent that it failed to "advance or preserve" trial counsel's ineffectiveness. (Am. Pet. Mem. at 42).[7]

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[7] Within his original petition for habeas relief Graziano raised the following additional claims regarding error on the part of the trial court: (a) giving an improper instruction to the jury concerning self-defense which allegedly suggested to the jury that he used deadly force intentionally rather than by accident; (b) denying Petitioner's motion for a mistrial due to "prosecutorial misconduct" during the prosecution's opening remarks; (c) allowing the jury to view a graphic photograph of the victim in a "pool of blood;" and (d) "misdefining" third degree murder in its charge to the jury and "in re-misdefining [sic]" third degree murder in its answer to a jury question. (Pet. at 9 – Ground one). He also alleged ineffective assistance of trial counsel due to: (a) failure to object to "prosecutorial misconduct" in the prosecution's closing and opening argument regarding Petitioner's character, credibility, manner of dress, lifestyle and demeanor; (b) failure to investigate for potential character witnesses and to consult with Petitioner concerning potential character witnesses; (c) failure to "utilize the above claims of prosecutorial misconduct and/or to have colloquied the Commonwealth witness who testified that the victim said [Petitioner] was a drug dealer to argue that the prosecutor deliberately elicited this information;" and (d) failure to "investigate and pursue, as a supportive defense, [Petitioner's] intoxication, as his testimony and the record is [sic] indicative of such a defense; or to have conducted pretrial investigation concerning commonwealth's rebuttal witness, or to have adequately cross-examined and/or utilize [sic] evidence readily available to impeach

(continued...)

Respondent, in its Response to the Amended Petition, argues that these claims are alternately either untimely, unexhausted, or lacking in merit. We consider the merits of those claims where we conclude that review is not precluded by procedural impediments. Ultimately, we conclude that relief is not warranted on any of Petitioner's claims.

II. LEGAL STANDARDS

Respondent contends that certain claims presented by Petitioner are either untimely or procedurally defaulted and that others fail on the merits under the standard of review mandated by

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[7](...continued)
[C]ommonwealth's rebuttal witness." (Pet. at 9 – Ground three, reverse side of 9). Additionally, in his first supplement, Graziano raised for the first time a claim alleging ineffective assistance of all prior counsel due to a failure to advance and preserve claims regarding the trial court's alleged error in denying Petitioner a fair and impartial jury of his peers by unjustifiably limiting the jury pool to "death qualified" jurors despite the prosecution's lack of evidence regarding aggravating circumstances and alleging ineffective assistance of trial counsel for failing to object to "repeated inflammatory and prejudicial line of questioning and remarks made by the prosecution, throughout trial." (Doc. 13 at 4-5).

Respondent argued that the now-abandoned claims raised in the initial petition were unexhausted, but did not address the claims raised in Graziano's supplement. In that we proceed upon the amended petition which superseded the original petition, we do not pass upon these claims. We note, however, that Petitioner himself admits that all but one of the claims from the original petition – the denial of the motion for mistrial after opening argument – were never presented in state court. (Pet. at 10). They are thus procedurally defaulted. As for the claim that Petitioner does not expressly acknowledge to be unexhausted, he argued this claim generally before the Superior Court on direct appeal, but the court found it to have been waived due to a procedural failure. (Graziano I at 3, *in* Am. Pet. Appx. Ex. I). This constitutes a denial of Petitioner's claim based on an adequate and independent state law ground, which a federal court may not review absent a showing of cause and prejudice or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). Further, he offers only ineffective assistance of prior counsel as cause for the default (Pet. at 10), and, as discussed later (see *infra* at 16) this ineffectiveness claim itself must have been raised in state court, which it was not, to constitute "cause" to excuse the default. He provides no further claim that a "fundamental miscarriage of justice" would occur absent review of these claims, and we find no basis for such a claim on our own. Accordingly, even if we were to address the claims, they would fail. The same applies to the claims raised in the supplement which are likewise unexhausted and procedurally defaulted. Petitioner could not show cause and prejudice or a fundamental miscarriage of justice to excuse the default. These claims would likewise fail.

the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). It is appropriate, therefore, for us to first set out the general standards under which we must consider an AEDPA petition.

A. Commencement of the Limitation Period

The AEDPA imposes a one-year period of limitations for the filing of an application of a writ of habeas corpus. *See* 28 U.S.C. § 2244(d). Specifically, the statute provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
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> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. Further, a prisoner whose direct review concluded prior to the passage of the AEDPA retains a full one-year limitation period from the statute's effective date, April 24, 1996, to timely petition for

habeas review. *See, e.g., Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998) (and cases cited therein). This petitioner would have until April 23, 1997 to file a timely habeas petition. *Id.*

This one year time-period is tolled, however, during the time in which a petitioner seeks post-conviction or collateral review. The state collateral claim must, of course, be "properly filed." The United States Supreme Court has determined that for habeas purposes, "time limits, no matter their form, are 'filing' conditions." *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Therefore, when a Pennsylvania state court rejects a petitioner's PCRA claim as "untimely," that collateral action was not "properly filed" and that petitioner is not entitled to a tolling of the one-year limitation period under § 2244(d)(2). *See id.*

Additionally, the Third Circuit recognizes that an "equitable tolling" of this one-year time limit may be appropriate in certain rare circumstances. *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998) (citations omitted). The Circuit Court has identified four narrow circumstances in which equitable tolling of a limitations period may be proper: (1) if the defendant has actively misled the petitioner; (2) if the petitioner has in some extraordinary way been prevented from asserting his rights; (3) if the petitioner has timely asserted his rights in the wrong forum; or (4) in a Title VII action if the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that he had done everything required of him. *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted). However, "[t]he law is clear that courts must be sparing in their use of equitable tolling." *See Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239 (3d Cir. 1999); *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998).

B. Exhaustion of State Remedies, Procedural Default

A prerequisite to the issuance of a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In order for a petitioner to satisfy this requirement and give the state courts "one full opportunity to resolve any constitutional issues," he must have fairly presented the merits of his federal claim to the state courts "by invoking one complete round of the established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). A petitioner is further required to "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). This requirement ensures that state courts have "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). If a bypassed state remedy is no longer available because it is time-barred due to a state limitations period, the petitioner will be deemed to have procedurally defaulted those claims. *O'Sullivan*, 526 U.S. at 848.

Where a claim is procedurally defaulted, it cannot provide a basis for federal habeas relief unless the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or [unless he] demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The procedural default doctrine and the cause and prejudice standard are "grounded in concerns of comity and federalism." *See id.* at 730. To establish cause, the petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Attorney error rising to the level of a Sixth

Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1994) may establish cause, but such ineffectiveness must first have been properly presented to the state courts as an independent claim. *See Carrier*, 477 U.S. at 488-89; *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). To establish prejudice, the petitioner must show "actual prejudice resulting from the errors of which he complains." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (quotations omitted). The fundamental miscarriage of justice exception requires that a petitioner provide "new reliable evidence" showing that "a constitutional violation has probably resulted in the conviction of one who is *actually innocent*." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995) (emphasis added and quotations omitted); *see also House v. Bell*, 547 U.S. 518, 537-39, 555-56 (2006); *Cristin v. Brennan*, 281 F.3d 404, 412 (3d Cir. 2002).

C. Standard for Issuance of the Writ

In cases where the claim presented in a federal habeas petition was adjudicated on the merits in state court, the AEDPA requires that substantial deference be given to the state court's adjudication of the merits. Specifically, relief shall not be granted unless the adjudication —

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has made it clear that a habeas writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing law set forth in [United States Supreme Court] cases, or if [the state court] decides a case differently than

[the United States Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." *Id.* This requires the petitioner to demonstrate that the state court's analysis was "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). In addition, this standard obligates the federal court to presume that the "state courts know and follow the law" and precludes the federal court from determining the result of the case without according all proper deference to the state court's prior determinations. *Id.* at 24.

III. DISCUSSION

We now proceed to discuss those due process and ineffective assistance claims which Graziano has presented in his Amended Petition and accompanying memorandum.

A. Due Process Claims

Graziano alleges due process violations due to (a) an unconstitutional mandatory instruction to the jury regarding intent; (b) the improper admission evidence regarding a prior gun possession; (c) the improper denial of a motion for mistrial following Ms. Marano's testimony that the victim had told her that Petitioner was a drug dealer; and (d) insufficient evidence to support a first-degree murder verdict. (Am. Pet. at 2-3, 5). We address these various sub-claims in turn.

1. Unconstitutional jury instruction[8]

Petitioner argues that the court's jury instruction concerning his possession and use of a

[8] Included in this claim is a derivative ineffectiveness claim for failure of prior counsel to have raised this claim. In that both claims were raised at the same time, they are both untimely for the same reasons. Both were likewise unexhausted in state court. Accordingly, our disposition of the underlying improper mandatory presumption claim applies equally and with the same reasoning as the derivative ineffectiveness claim.

firearm created an impermissible mandatory presumption in violation of his due process rights under the Fourteenth Amendment. (Am. Pet. at 24, Rep. Br. at 21). In the disputed instruction which was based upon, and tracked virtually verbatim, the language of 18 Pa. C.S.A § 6104, the court stated:

> In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a firearm, used or attempted to be used, and had no license to carry same, shall be evidence of his intention to commit said crime of violence.

(N.T. 4/6/92 at 15).

Petitioner argues that this language mandated to the jury that it was required to find that Petitioner acted with intent to commit murder based upon the mere finding of the predicate fact of his carrying an unlicensed firearm which discharged. (Rep. Br. at 23). The instruction, according to Petitioner, thus created a mandatory presumption as to the element of intent which relieved the prosecution of its burden to prove every element of the offense,[9] and thus violated the Supreme Court's holdings in *Sandstrom v. Montana*, 442 U.S 510 (1979) and *Francis v. Franklin*, 471 U.S 307 (1985) which generally preclude a mandatory presumption of any element of a criminal offense. (*Id.*). The District Attorney, on the other hand, argues that this claim is time-barred, unexhausted, and lacks merit in any event. (Am. Resp. at 23-26). In that we agree that the claim is both time-barred and unexhausted, we recommend it be rejected without reaching the merits.

Petitioner did not include this claim in his initial habeas petition, but rather raised it for the

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[9] As the trial court instructed, to prove first degree murder the prosecution was required to show the following three elements beyond a reasonable doubt:

> First, that Dominic Capocci is dead.
> Second, that Edward Graziano killed him.
> And third, that the defendant, Edward Graziano, did so with the specific intent to kill and with malice.

(N.T. 4/6/92 at 30).

first time as claim (8) in his first "Supplement Petition of Writ of Habeas Corpus" filed on September 9, 2005.[10] (Doc. 13 at 5). The Pennsylvania Supreme Court denied Graziano's petition for allowance of appeal on October 24, 1995. His conviction became final ninety days later, on January 22, 1996, when the period for seeking a writ of certiorari to the United States Supreme Court expired. In that this date came before the enactment of the AEDPA, however, we use April 24, 1996 as the start date for the one-year period of limitation. *Burns*, 134 F.3d at 111.

Pursuant to § 2244(d)(2), the one-year period was tolled 265 days later on January 14, 1997, the date that Petitioner properly filed his first PCRA petition for post-conviction relief. The limitation period remained tolled until February 24, 2005, when the state Supreme Court denied discretionary review of Petitioner's PCRA appeal. Fifteen days later, Petitioner timely filed his first habeas petition. 280 of Petitioner's 365 allotted days had expired, leaving him only 85 days to timely file any new claims.[11] Petitioner, however, did not raise this mandatory presumption claim

[10] The docket sheet indicates the Clerk's Office of this Court received this pleading on September 19, 2005. However, following the prison mailbox rule, *see Burns*, 134 F.3d at 112, we construe the filing date as the date Petitioner hand-delivered the petition to prison officials for mailing. Petitioner's signature at the end of the pleading indicates a date of September 9, 2005. (Doc. 13). For purposes of this Report and Recommendation we accept this date as the date that this pleading was filed.

[11] In *Mayle*, 545 U.S. at 662-64, the Supreme Court held that new claims raised for the first time in an amended habeas petition remain independently subject to the AEDPA's one-year time limit unless they "are tied to a common core of operative facts" as a claim raised in the initial petition and thus relate back to the initial petition. Respondent asserts, and Petitioner nowhere disputes, that this claim does not arise from the same core facts as any of the claims raised in his initial petition for habeas relief, that the claim thus does not relate back to the initial habeas petition for time-limitation purposes, and that the claim is thus untimely under *Mayle*. (Am. Resp. at 24). We agree.

until September 9, 2005, 182 days after filing his first habeas petition. He was 97 days late.[12] This claim is plainly untimely.[13]

Petitioner argues that he was prevented "'in an extraordinary way' from asserting his rights" and is entitled to equitable tolling due to "abandonment by his counsel, a bout with depression and suicidal ideation, and an attempted suicide . . . ." (Pet. Rep. at 14) (citing *Jones*, 195 F.3d at 159). Specifically, Petitioner argues that he:

> had been suffering from severe depression and suicidal ideation in June and July of 2005, and attempted to commit suicide on June 27 of that year. [Petitioner] spent several weeks in a mental health unit where he was confined and monitored 24 hours per day to make sure he did not harm himself.
>
> Additionally, on April 19, 2005 Petitioner's attorney abandoned him and suggested that he proceed on the habeas petition pro se. It was only a few weeks later, on June 2, 2005, that Petitioner was admitted into a mental health unit. . . . Petitioner's circumstances were precisely those that the equitable tolling doctrine was designed to protect. Therefore, [Petitioner] was entitled to equitable tolling from June 2, 2005, when he was first admitted into the mental health unit until at least July 11, 2005, when he was discharged from the second of two nearly back-to-back stints in the mental health unit.

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[12] Petitioner incorrectly asserts that he was entitled to an additional 90 days of tolling after February 24, 2005, during the time in which he "had to seek Certiorari review in the Supreme Court." (Pet. Rep. at 13). The 90 day certiorari period does not apply in the tolling analysis under § 2244(d)(2), however, but rather applies only to the determination of the date on which the conviction became final – the trigger of the one year time-period under § 2244(d)(1)(A). *Lawrence v. Florida*, 127 S. Ct. 1079, 1081-85 (2007); *see also Nara v. Frank*, 264 F.3d 310, 318 (3d Cir. 2001). Post-conviction or collateral proceedings become final after a decision by the state's high court, and for purposes of tolling under § 2244(d)(2), "application for state postconviction review is therefore not 'pending' after the state court's postconviction review is complete . . . ." *Lawrence*, 127 S. Ct. at 1083.

[13] As discussed above, 28 U.S.C. § 2244(d)(1), in addition to the date that a conviction becomes final, provides three alternative trigger dates to the one year time limitation period. Petitioner nowhere argues, and upon independent review we do not find, that any of these apply here.

(Pet. Rep. at 15). Thus Petitioner argues that he is entitled to 39 additional days of equitable tolling.[14]

We need not determine, however, whether Petitioner's situation is indeed indicative of the "extraordinary circumstances" necessary to trigger the rare application of equitable tolling. *See Nara*, 264 F.3d at 319-20. In that Graziano first raised this claim 97 days after the expiration of his one year time-limit, even were we to apply 39 days of equitable tolling, the claim would remain 58 days late. The argument, therefore, provides him no relief. His claim remains untimely.[15]

Petitioner also acknowledges that he failed to exhaust this claim in state court. (Am. Pet. Mem. at 30).[16] He thus devotes numerous pages in his supplement to the counseled Reply Brief arguing why he should be excused from this failure to exhaust due to the "cause and prejudice" and the "miscarriage of justice" exceptions. In that we find the claim to be untimely and thus time-

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[14] The District Attorney acknowledges (Am. Resp. at 23) that Petitioner did eventually present this claim to the state court in his April 15, 2005 PCRA petition, where it was dismissed as untimely. (Am. Pet. Mem. at 10; Am. Resp. at 4). Accordingly, that collateral action was not "properly filed" under § 2244(d)(2), *Pace*, 544 U.S. at 417, and Petitioner properly does not argue that he is entitled to an additional statutory tolling of the one-year limitation period as a result of that action.

[15] We note that even were we to discuss the merits of Graziano's equitable tolling argument, they would likely fail. Although Petitioner's own medical reports, attached to his Reply Brief as "Appendix A," do corroborate his general claim that he was placed in the mental health unit during the period alleged, page 4 of the Appendix reveals that "there are numerous indications that this is a malingered, manipulative, self-mutilative gesture." Further, he has offered no documentation as to the alleged "abandonment" by counsel. We strongly doubt that this is sufficient to trigger the rare and sparing applicability of equitable tolling.

[16] Petitioner is correct. It appears that the first time he raised this claim in state court was on September 6, 2005, in an application to amend the second PCRA petition. (See Am. Pet. Appx. Ex. B). In that the petition was denied as untimely, the state court's disposition of this claim rests upon an adequate and independent state procedural ground, which results in the claim's procedural default. See *Coleman*, 501 U.S. at 749-50.

barred, we need not address the issue of whether he is likewise precluded from raising this claim as a result of his failure to exhaust. We assume, however, given his assertion of an argument of actual innocence, that Petitioner wishes to apply this argument as a justification to excuse the time-bar, and that this argument could provide a justification to excuse the time-bar. We note that this matter has not been decided by the Third Circuit. *See, e.g., Horning v. Lavan*, No. 04-4609, 197 Fed. Appx. 90, 93 (3d Cir. Oct. 2, 2006) ("[w]e have yet to hold that the AEDPA statute of limitations can be equitably tolled on the basis of actual innocence.").

To establish actual innocence, a petitioner must provide "new reliable evidence," which demonstrates that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 324, 327-28. In other words, he must show "that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. Such new evidence should generally take the form of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324; *see also Hubbard v. Pinchak*, 378 F.3d 333, 339-40 (3d Cir. 2004). The analysis must be conducted "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Schlup*, 513 U.S. at 328 (quotation omitted).[17]

Petitioner cites as "new evidence" the testimony presented by Dr. Taff at the PCRA

[17] We note "that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Accordingly, it is well-settled that a showing of "actual innocence" does not, in and of itself, give rise to an independent substantive habeas claim. *See id.* at 506 U.S. at 400-01 (and cases cited therein). Such a showing, rather, serves as a procedural "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315.

evidentiary hearing that, first, the gunshot wound sustained by Dominic Capocci could only have been a "distant"shot, and, second, that Capocci "would have been in an 'excited' state of alcohol intoxication" given his blood alcohol level. (Rep. Br. Supp. at 2-3). He also contends that the substitution of a "proper" jury instruction in the place of the allegedly improper jury instruction at the heart of this habeas claim would constitute "new evidence" tending to show his innocence. (Rep. Br. Supp. at 3-4). He concludes that in light of this evidence, in addition to the evidence offered at trial, "it is more likely than not that the jury would have had a reasonable doubt about Petitioner's intent to kill the victim." (Rep. Br. Supp. at 10).

For the sake of this discussion, we will assume that this PCRA hearing testimony from 2002 constitutes "exculpatory scientific evidence" and, in turn, qualifies as "new reliable evidence not presented at trial," *Hubbard*, 378 F.3d at 339-40, and then consider whether "no reasonable juror would have convicted [Graziano] in light of the evidence," *Schlup*, 513 U.S. at 324, 327-28. In so doing, we find that Petitioner significantly overstates the strength of Dr. Taff's testimony. On the first point, the distance of the gunshot, Petitioner argues that Dr. Taff's testimony "would have strongly supported Petitioner's defense that . . . the victim was five to six feet away from him when the gun accidentally discharged." (Rep. Br. Supp. at 3). We recognize that Dr. Taff did indeed testify that in his opinion, Dr. Preston's testimony at trial that Capocci's wound would have been consistent with a close-range shot was incorrect, and that the wound, rather, would have been a "distant shot." (N.T. 6/27/2002 at 22). He was unable, however, to be any more precise than to say that the distance was "two feet or beyond." (N.T. 6/27/2002 at 21-22, 53). So, while we recognize that Dr. Taff's conclusion as to the wound's inconsistency with a close-range shot may be somewhat inconsistent with the testimony of Dr. Preston's on the same point, it certainly does not establish,

as Petitioner argues, that the shooting occurred from a distance of five to six feet.

Further, to the extent that Petitioner argues that Dr. Taff's testimony would have served to impeach that of Dr. Preston, we note that Dr. Preston testified that it was, in fact, impossible to draw a conclusion as to the actual distance, and he proffered no such estimate. (N.T. 4/1/92 at 67-69). Thus Dr. Taff's estimate of a distance of two feet or more is not inconsistent with, and would not have served to impeach Dr. Preston. As Attorney Grimes testified, "[t]he fact that a pathologist is going to say, well, yeah, it could be more than 18 inches wasn't going to help . . . ." (N.T. 6/27/02 at 86). Further, viewing the record as a whole, including evidence favorable to the Commonwealth, as we must under *Schlup*, even if Petitioner had pressed the point at trial and mounted a stronger challenge to Dr. Preston's equivocal testimony, we recognize that it could have been contradicted by the unequivocal testimony of ballistics expert Officer O'Hara, who testified at sentencing that in his opinion, the gun "had to be, if not physically touching [Capocci's] head, within an inch to inch and-a-half to his head. . . . the barrel of the firearm is physically pushed into the head in this fashion." (N.T. 4/8/92 at 17).

To the extent that Petitioner argues Dr. Taff's testimony would have "discredited the testimony of Commonwealth's eyewitnesses" as to the distance of the gunshot (Rep. Br. Supp. at 3), Petitioner overstates this point. In fact, the Commonwealth's witnesses as a whole established only that the shooting occurred from a distance of anywhere between less than one foot to four feet. For instance, Anthony Spina testified that the gun was "[n]ot even a foot" away from Capocci's head when it discharged. (N.T. 3/31/92 at 25). Derrick Iovacchini, on the other hand, testified that Graziano and Capocci were "[m]aybe two foot, three foot [sic]" away from each other *before* Graziano took a step back and pulled out the gun. (N.T. 3/27/92 at 115). According to Iovacchini,

therefore, Petitioner had to have been more than two to three feet away from Capocci when he fired the gun. Anthony Pacitti likewise testified that Petitioner was "[a]bout four feet" away from Capocci when he pulled the gun out. (N.T. 4/1/92 at 99). Dr. Taff's testimony that the shooting occurred from a distance beyond two feet, therefore, would have contradicted Spina's testimony, but would have been wholly consistent with, and would have thus not discredited, Iovacchini's and Pacitti's testimony.[18] In any event, Petitioner fails to explain how a showing that the shot was from six feet away as opposed to a foot or two away would have made any difference to a reasonable juror's consideration of the case.

We note, finally, that in any event counsel had a compelling reason for not pressing this point at trial in that it would have been inconsistent with the overarching defense strategy of showing that Petitioner had no avenue of retreat and was thus justified in pulling the gun in self-defense. As Attorney Grimes testified at the evidentiary hearing:

> The defense in the case was that Eddie was surrounded by this group of youths because of a girl that was sort of pursuing Eddie at the club and so in one respect it was important for us for those people including the deceased to be close to Eddie because he otherwise would be able to retreat, be able to leave the scene if they weren't surrounding him, so it was important for us to have everyone close. . . . the further the gun was away reinforced the specific intent to kill. It made it look like an accurate and measured shooting the greater the distance . . . . proximity is consistent with our version of the events.

(N.T. 6/27/02 at 83, 98-99). A showing that the gunshot was from a distant range would have thus been counter-productive to Petitioner's defense theory. Accordingly, Dr. Taff's testimony as to Graziano's distance from Capocci at the time of the shooting does little, if anything at all, to cast any

[18] The notes are unclear as to the distance which Stephanie Marano testified to, as her testimony on this point was done through a demonstration. (*See* N.T. 3/30/92 at 33).

doubt upon the jury's finding that Petitioner intentionally killed Dominic Capocci.

Petitioner also argues that Dr. Taff's testimony about Capocci's behavioral state at the time of the shooting "would have strongly supported Petitioner's defense that the victim was the aggressor as his blood alcohol indicated." (Rep. Br. Supp. at 3). Dr. Taff's testimony on this point, however, in fact only indicates that the blood alcohol content could have been indicative of a number of different mental states. Dr. Taff did indeed testify that in his opinion, Capocci likely "was in the excited phase of ethyl alcohol." (N.T. 6/27/2002 at 24). He conceded, however, that in his opinion, Dr. Preston's conclusion (that he would not expect someone at Capocci's level of intoxication to be quick acting or aggressive) was merely "not fully correct. . . . because there's always a possibility the flip side where someone may be aggressive, he may not be aggressive. It depends on the personality, his mood and the company he's keeping at the time." (N.T. 6/27/2002 at 27). He further conceded that, in fact, Capocci "could have been excited, he could have been happy. He may also have been sleepy, but it depends on his personality, his custom of drinking and the social environment in which he's at at the time." (N.T. 6/27/2002 at 25). In the end, Dr. Taff was unable to conclude what Capocci's behavioral mood *actually* was at the time of his death, and, importantly, confirmed that Dr. Preston's opinion on Capocci's mood was indeed at least consistent with the eyewitness testimony. (N.T. 6/27/02 at 61, 63-64).

We do not accept that this testimony controverts Dr. Preston's testimony at trial, which was likewise far from unequivocal. In fact, Dr. Preston conceded that he had not viewed any evidence in the case consistent with his opinion that Capocci would likely be in a "mellow" state and that someone with a lower level of intoxication could likewise become "more verbose or active." (N.T. 4/1/92 at 78-80). Petitioner's "new evidence" on this point would have been little more than an

equivocal attempt at expert impeachment in response to equally equivocal expert testimony, and does little to make Petitioner's version of the facts any more believable now than it was at trial. It is likewise a feeble response to the testimony of six eyewitnesses who interacted with Capocci throughout the night and in the immediate moments preceding the shooting and who testified that, in fact, Capocci was in a good mood the entire night.[19] Dr. Taff's testimony on this issue thus does little to cast any doubt on the jury's conclusion that Petitioner intentionally killed Capocci. Indeed, it fails to even remotely approach the level of persuasion "that more likely than not any reasonable juror would have reasonable doubt" about Petitioner's guilt. *House*, 547 U.S. at 538.

Petitioner also claims that a proper instruction to the jury in the place of the allegedly improper instruction based on 18 Pa. C.S.A. § 6104 constitutes new evidence supporting a showing of evidence of actual innocence. (Rep. Br. Supp. at 4). This, however, is not the "kind of new evidence contemplated by the Supreme Court, such as 'exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.'" *Hubbard*, 378 F.3d at 340 (citing *Schlup*, 513 U.S. at 324). Additionally, this "evidence" can hardly be considered new, in that it was readily available at trial had Petitioner pressed the point. *See id.* Accordingly, we do not consider this "evidence" as part of our analysis.

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[19] This number includes Derrick Iovacchini (N.T. 3/27/92 at 114), Stephanie Marano (N.T. 3/30/92 at 27, 30, 41), Anthony Spina (N.T. 3/31/92 at 16), Anthony Pacitti (N.T. 4/1/92 at 115) and Hope Myers (N.T. 3/31/92 at 97, 125, 145, 149-50). Also included is Petitioner's own witness, Anthony Piazza, a loyal friend who both fled the scene and shared a cab with Petitioner immediately after the shooting. (N.T.4/2/92 at 28-33). Piazza testified that he had shot pool with Capocci throughout the night and that Capocci was in a peaceful and happy mood the entire time, and pertinently, at the end of the night. (N.T. 4/2/92 at 24, 26). Indeed, Petitioner himself admitted that Capocci seemed to him to be "happy, well behaved and peaceful . . . like he was in a good mood." (N.T. 4/2/92 at 129). All the witnesses likewise agreed that there had been no confrontations inside the club.

Even were we to assume, *arguendo*, that this different instruction would qualify as "new evidence" under *Schlup*, it would still be unhelpful. The inescapable fact is that even entirely ignoring any and all consideration of illegal handgun possession as evidence of intent to commit murder, the record is replete with evidence of Petitioner's guilt, including: the testimony of four eyewitnesses who stated that Petitioner intentionally shot Capocci, six eyewitnesses who stated that Capocci had been in a happy and peaceful mood throughout the entire night, as well as evidence that Petitioner fled the scene of the shooting and avoided arrest by traveling to Florida, and evidence that Petitioner disposed of the murder weapon. (*See supra* at 3, 5-7). This certainly constitutes ample evidence on the record to show that Capocci was not the aggressor and that Petitioner intentionally shot and killed him.

We are thus convinced that the "new" evidence presented by Petitioner fails to show that "it is more likely than not that no reasonable juror would have convicted him," *Schlup*, 513 U.S. at 327-28 or "that more likely than not any reasonable juror would have reasonable doubt" as to his intent to kill. *House*, 547 U.S. at 538. Accordingly, Petitioner is not entitled to the benefit of an actual innocence exception to the AEDPA one-year time limitation, assuming that such an exception is even available, which is an unsettled proposition in itself, *see Horning*, Fed. Appx. at 93. We thus recommend that this untimely, unexhausted claim be rejected.[20]

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[20] Even if we were to reach the merits of this time-barred and unexhausted claim, we would reject it. To the extent that Petitioner can be read to argue that counsel was ineffective for failing to raise a cognizable state law claim in state court, we note that no state court had ruled on the issue until 1993 in *Commonwealth v. Sattazahn*, 631 A.2d 597 (Pa. Super. 1993), and the state Supreme Court did not find the instruction unconstitutional until 1999 in *Commonwealth v. Kelly*, 724 A.2d 909 (Pa. 1999). The Sixth Amendment, however, "does not require counsel for a criminal defendant to be clairvoyant." *United States v. Golden*, No. 07-7003, 2007 U.S. App. LEXIS 26803, *10 (10th Cir. Nov. 20, 2007) (citing *United States v. Harms*, 371 F.3d 1208, (continued...)

2. Improper admission of prior gun possession

Petitioner next argues that he was denied his rights to due process when the trial court admitted evidence of his prior possession of a handgun similar to the one used to kill Capocci. (Am. Pet. at 5; Rep. Br. at 32). Specifically, Petitioner argues that the admission of this evidence lacked probative value and that to the extent that it did have any probative value, it was conspicuously outweighed by the accompanying prejudice such that it "violated Petitioner's right to a fair trial." (Am. Pet Mem. at 80; Rep. Br. at 32-33). The District Attorney argues that Petitioner never presented the federal nature of this claim to the state courts, that he thus failed to exhaust this claim, and that it is now procedurally defaulted. (Am. Resp. at 37). The District Attorney further argues that, notwithstanding the procedural default, the claim lacks merit in any event. (Am. Resp. at 40-

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[20](...continued)
1212 (10th Cir. 2004)). Counsel is likewise not presumed to be ineffective for failing to press any and every claim that may possess merit. As the Supreme Court has made clear, an appellant has no "constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Counsel, rather, is free to, and indeed is expected, in his professional judgment and consistent with his ethical obligations, to "winnow[] out weaker arguments on appeal and focus[] on one central issue if possible, or at most on a few key issues" *id.* at 751-52, which appellate counsel in this case certainly did. Accordingly, we would not find counsel to be ineffective for failing to raise this claim.

To the extent that Petitioner requests us to find on our own that the instruction creates an unconstitutional mandatory presumption, we would decline the invitation. A state law decision is not binding on this issue of federal law, and the cases upon which he relies are certainly not persuasive. Indeed, we find a reading of a sentence which says that "existence of fact X shall be evidence of conclusion Y" to somehow actually say that "existence of fact X shall be dispositive of conclusion Y" to be an obviously improper extension of the analogy. *See Commonwealth v. Hall*, 830 A.2d 537, 552 (Pa. 2003) (Newman, J. dissenting) (Confirming that the court in *Kelly* had read the instruction, which had tracked the language of 18 Pa.C.S. § 6104, as a mandate to the jury "that, if the defendant was adjudged by them to be carrying a firearm without a permit, they must find that the defendant intended to commit aggravated assault."). Further, in that the law presumes jurors to be able to follow instructions, we would not presume that a reasonable juror would so understand such an instruction.

41). We agree and turn, first, to the question of whether Petitioner has properly exhausted this claim.

To properly exhaust a claim, a petitioner is required to alert the state courts that he is, in fact, raising a federal claim. This is important because a claim in state court may require a different legal showing than a similar claim in federal court. *See, e.g.*, *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). As the Third Circuit has summarized, "'[i]t is not sufficient that all the facts necessary to support the federal claim were before the state courts,' and 'mere similarity of claims is insufficient to exhaust.'" *Keller v. Larkins*, 251 F.3d 408, 414 (3d Cir. 2001) (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982) and *Duncan*, 513 U.S. at 366). Rather, a petitioner is required to "apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan*, 513 U.S. at 366.

Here, it is clear that Judge Jackson's initial denial of Petitioner's post-trial motion for a new trial was based exclusively upon state law (Post-trial Mot. at 5-6, *in* Am. Resp. at Ex. A), that Petitioner's direct appeal of this decision to the state Superior Court was based exclusively upon state law (Dir. App. Br. at 8-11, *in* Am. Resp. at Ex. G), and that the Superior Court, in rejecting the appeal, relied exclusively upon state law (Graziano I at 4-5, *in* Am. Pet. Appx. Ex. I). Although Petitioner now argues that the Superior Court's decision was "contrary to clearly established federal law" (Am. Pet. Mem. at 77), it is clear that the decision was not, in fact, based on federal law at all. This claim, therefore, has not been properly exhausted and is now procedurally defaulted.[21]

[21] Petitioner argues that he did, in fact, raise the federal nature of his claim in a citation to *Government of the Virgin Islands v. Pinney*, 967 F.2d 912 (3d Cir. 1992) in his Petition for Allowance of Appeal to the Pennsylvania Supreme Court (Pet. All. App. at 8, *in* Am. Pet. Appx. Ex. H), but concedes that this was the first time that any federal caselaw was cited in support of (continued...)

Notwithstanding this failure to exhaust, the claim may nonetheless be denied on the merits. *See* 28 U.S.C. § 2254(b)(2). For the reasons which follow, we agree with Respondent that this claim lacks merit, and recommend, alternatively, that it be denied on its merits.

As a general matter, "[a]dmission of 'other crimes' evidence provides a ground for federal habeas relief only if 'the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial.'" *Bronshtein v. Horn*, 404 F.3d 700, 730 (3d Cir. 2005) (quoting *Lesko v. Owens*, 881 F.2d 44, 52 (3d Cir. 1989)). Petitioner argues here that the testimony of Biarritz bar manager Steven DeMarco, that on a prior occasion, approximately six months before the shooting, he had confiscated from Petitioner a semi-automatic handgun similar to the one used to kill Capocci, was improperly admitted in that it lacked probative value and that to the extent that it had any probative value, that value was conspicuously outweighed by the accompanying prejudice. (Am. Pet Mem. at 80; Rep. Br. at32-33).

The evidence at issue was admitted for a specific and limited purpose; namely, to rebut Petitioner's own testimony that the gun's discharge was accidental and that his very coming into possession of the gun was pure happenstance. In response to a question about how he had come into possession of the gun, he testified:

> The guy John Milnes who was sitting at the bar with us, when we were leaving [the Aztec Club], as we were walking down the steps . . . he asked me to come in the bathroom to talk to me. And then he

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[21](...continued)
this claim. (Am Pet. Mem. at 86-87). To the extent that this case citation even supports a claim of improper admission of evidence (the case, in actuality, was cited as support for the proposition that in certain instances a jury instruction will be insufficient to cure potential prejudice), as the District Attorney properly argues (Am. Resp. at 39), the Supreme Court has held that a claim submitted for the first time to a state's highest court on discretionary review is not "fairly presented" for purposes of exhaustion. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

> asked me if I could hold something for him. I said what. He pulls out a gun and said he was leaving with a girl he just met and didn't want her to see it and that he would meet me at Biarritz to pick it up. . . . So I grabbed the gun and put it into my waistband and I walked out, and before I walked out I reminded him the doors close [at Biarritz] at three o'clock, to be there before three so he can get in [in order to retrieve the gun].

(N.T. 4/2/92 at 69-70).

The prosecution, as rebuttal to this testimony, offered testimony from Mr. DeMarco. (See, e.g., N.T. 4/3/92 at 4-5). He testified that on a prior occasion at the Biarritz, approximately six months before the night of the shooting, he had confiscated a .380 semi-automatic handgun from Graziano and returned it to him at the end of the night. (N.T. 4/3/92 at 25-27). This evidence was thus used to counter the theory posited by Petitioner in his testimony – which was contrary to the prosecution's own theory of the case – that he had been armed from the start. (*See, e.g.*, N.T. 4/3/92 at 72, 79 ("And, ladies and gentlemen of the jury, you know it was the same .380 automatic he had. That was his gun, that was his piece. It wasn't John Milnes' piece. Who does he think he is kidding? . . . If you think there is a John Milnes, I got a bridge to sell you up in Brooklyn.")). The trial court, in turn, made the limited purpose of this testimony clear in its instruction to the jury. Specifically, Judge Jackson instructed the jury that:

> This evidence is before you for a limited purpose; that is, for the purpose of tending to rebut the defendant's claim of accidental possession and use of a handgun. This evidence must not be considered by you in any other way than for the purpose I have just stated. You must not regard this evidence as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt. If you find defendant guilty, it must be because you are convinced by the evidence that he committed the crime charged and not because you believe he is wicked or has committed other improper conduct.

(N.T. 4/6/92 at 18).

Petitioner argues that the issue of whether his possession of the gun was intentional or mere happenstance is irrelevant. (*See, e.g.*, Am. Pet Mem. at 82). While we can understand that there may be some question about the balance between the prejudicial effect and the probative value of the evidence concerning the means by which he came into possession of the gun, we will defer, as we must, to the discretionary ruling of the state court trial judge and affirmed by the Superior Court, particularly where the admission of the evidence also goes to the question of whether the shooting was accidental as Petitioner has argued. As the prosecution asserted: "The jury, I submit, is not going to believe that a man who has a .380 automatic in the past, knows guns, is just going to accidentally squeeze off a round through somebody's head." (N.T. 4/2/92 at 76). We agree with the Superior Court that "[t]he testimony . . . is probative of the Commonwealth's attempt to establish that the shooting was not accidental, as [Graziano] had experience and was familiar with semi-automatic weapons." (Graziano I at 4-5, *in* Am. Pet. Appx. Ex. I).

Petitioner further argues that the testimony was prejudicial in any event. (*See, e.g.*, Am. Pet Mem. at 84). He argues, specifically, that the prosecution's references to the prior gun possession in closing "crossed the boundary by which the evidence was to be appropriately used" and, in combination with certain other references "played not only on the close and well-known connection between firearms and drugs, but also on the general notion that drug dealers have no regard for human life . . . ." (Pet. Rep. at 33; Am. Pet. Mem. at 84). To the extent that Graziano argues that the prosecution went too far in closing, we disagree in that the instances of "crossing the boundary" to which Petitioner refers are the very instances where the prosecution makes the point necessary to its theory of the case – that a jury who believes that Petitioner intentionally carried a gun would not

likely believe that he discharged it by accident. (*See* Pet. Rep. at 33). Petitioner's argument is without merit.

To the extent that Graziano argues that admission of prior firearm possession painted him as a drug dealer, the claim is simply too tenuous to stand. Petitioner points to no evidence about his being a drug dealer other than Ms. Marano's statement that Capocci had told her so, which promptly elicited a strong curative instruction from the trial court. Indeed, Petitioner does not argue to the contrary, but rather points to instances in which, he argues, the prosecution subliminally inferred, through comments about his dress and flashy lifestyle, that he was a drug dealer. This argument, however, would be considered as a "prosecutorial misconduct" claim and has nothing to do with the admission of DeMarco's testimony. In any event, we are not convinced that the prosecution's arguments to the jury can be fairly characterized as portraying Petitioner as a drug dealer and, indeed, our own review of the transcript confirms that the prosecution made no reference whatsoever, whether during trial or during his arguments to the jury, to Petitioner's being a drug dealer. Accordingly, Petitioner's assertion on this point is wholly unfounded.

We are satisfied that, on balance, any prejudice potentially resulting from the admission of DeMarco's testimony was outweighed by the probative value of the evidence, and was cured, in any event, by the trial court's careful instruction to the jury. Further, we are mindful that, in any event, the outcome of an evidentiary balancing test is an inherently discretionary decision, and one that is not and should not be easily second guessed. *See, e.g. Lesko*, 881 F.2d at 51-52 (and cases cited therein) (noting general consensus that "not every error in balancing probative value against prejudicial effect amounts to error which rises to constitutional dimensions.") We thus conclude that the opinion of the Superior Court, which agreed that the probative value of the evidence outweighed

any potential prejudice, was neither contrary to nor an objectively unreasonable application of federal law (even though, as discussed, it was not even given the opportunity to apply federal law), which allows relief only when "the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial." *Bronshtein*, 404 F.3d at 730. Accordingly, we recommend that this claim be denied not only because it is unexhausted, but also because it lacks merit.

3. Denial of motion for mistrial after Stephanie Marano's statement that Petitioner was a drug dealer

Petitioner next argues that he was denied due process when the trial court refused to grant a mistrial after Stephanie Marano testified that Capocci had, on the night of the shooting, told her that Graziano was a drug dealer. (Am. Pet. at 5; Rep. Br. at 33). Petitioner acknowledges that two cautionary instructions were given immediately after the statement at issue, but argues that they were "insufficient to protect his constitutional rights." (Am. Pet. Mem. at 94). The District Attorney, on the other hand, argues that Petitioner again failed to present the federal nature of this claim to the state courts, that he thus failed to exhaust, and that the claim is now procedurally defaulted. (Am. Resp. at 42). The District Attorney further argues that notwithstanding the procedural default, the claim is without merit. (Am. Resp. at 40-41). We turn, first, to the question of whether Petitioner has properly exhausted this claim.

As discussed, to properly exhaust a claim, a petitioner is required to "apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan*, 513 U.S. at 366. Once again, as with the claim challenging the admission of DeMarco's tesimony, it is

clear that Judge Jackson's denial of Petitioner's post-trial motion for a new trial was based exclusively upon state law (Post-trial Mot. at 6-7, *in* Am. Resp. at Ex. A), that Petitioner's direct appeal of this decision to the state Superior Court was based exclusively upon state law (Dir. App. Br. at 11-13, *in* Am. Resp. at Ex. G), and that the Superior Court, in rejecting the appeal, relied exclusively upon state law (Graziano I at 5-6, *in* Am. Pet. Appx. Ex. I). Petitioner argues that the Superior Court's decision was "both contrary to clearly established federal law and based on an unreasonable determination of the facts in light of the evidence presented." (Am. Pet. Mem. at 88-89). It is clear, however, that the position advanced and the decision made were not, in fact, based on federal law. This claim has not been properly exhausted and is thus now procedurally defaulted.[22]

Even if this claim had not been defaulted, Petitioner would not prevail on the merits. Petitioner correctly sets out the proper standard for reviewing the federal nature of this claim (*see* Rep. Br. at 33-34) by reference to the Third Circuit's opinion in *United States v. Newby*, where the court explained:

> In reviewing the district court's handling of the evidence that was subsequently stricken from the record, we presume that the jury will follow a curative instruction unless there is an 'overwhelming probability' that the jury will be unable to follow it and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant.

11 F.3d 1143, 1147 (3d Cir. 1993) (citing *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *United*

[22] Petitioner again argues that he did raise the federal nature of his claim in his citation to *Government of the Virgin Islands v. Pinney* in his Petition for Allowance of Appeal to the Pennsylvania Supreme Court (Pet. All. App. at 8, *in* Am. Pet. Appx. Ex. H), but concedes that this was the first time that any federal caselaw was cited in support of this claim. (Am Pet. Mem. at 103-04). To the extent that this case citation supports Petitioner's claim, as the District Attorney properly argues (Am. Resp. at 42), the United States Supreme Court has held that a claim submitted for the first time to a state's highest court on discretionary review is not "fairly presented" for purposes of exhaustion. *Castille*, 489 U.S. at 351.

States v. Hill, 976 F.2d 132, 144 (3d Cir. 1992)).

In this case, after Ms. Marano stated that Capocci had told her that Graziano was a drug dealer, defense counsel immediately objected and moved for a mistrial. (N.T. 3/30/92 at 20-21). The objection was granted, but the motion for mistrial was denied. (N.T. 3/30/92 at 22). The trial court then instructed the jury as follows:

> Ladies and gentlemen of the jury, in response to the District Attorney's question of the witness, Stephanie Marino gave some kind of a response. I was not clear as to what it was, but if you heard the response, I'm ordering you now to totally disregard that response, do not take that response in any way into your deliberations and thinking in this case; you're to totally disregard it.

(N.T. 3/30/92 at 23).[23]

Trial counsel next moved the trial court to voir dire the jury, whether "individually or not," first, as to whether they heard Ms. Marano's statement, and second, as to "whether or not they [could] be fair and impartial and disregard that answer based on [the trial court's] curative instruction." (N.T. 3/30/92 at 24). The trial court, as a result, again instructed the jury as follows:

> Ladies and gentlemen of the jury, I gave you what is known as a cautionary instruction, and I caution you, if those of you who have

[23] Immediately after this first instruction, a juror indicated that he was unable to hear the judge clearly. (N.T. 3/30/92 at 23). To the extent that Petitioner argues that this is relevant to the instruction's impact upon the jury (Am. Pet. Mem. at 94), we agree with the District Attorney (*see* Am. Resp. at 44) that any such concern was obviated by the trial court's second jury instruction which repeated and reiterated the substance of the first. To the extent that Petitioner argues that the instructions "failed to tell the jury which response exactly giv[en] by Ms. Marano were they [sic] to disregard," this argument is without merit, as the statement at issue was the last one she made before defense counsel's objection prompted the sidebar discussion and the eventual cautionary instructions. We note, for reasons which are entirely understandable, that trial counsel did not ask the court to repeat Ms. Marano's statement – accordingly, Petitioner has waived any claim that the court should have done so without such a request. Counsel certainly understood the risk associated with having the statement repeated and prudently, in our view, did not make that request.

> heard the response of the young lady, obviously, some of you didn't because you asked her to speak up, but those of you who heard her last response, I caution you to totally disregard that response, and no way take that into your deliberations in this case; is there anyone here that would disregard that cautionary instruction, and take that last response into consideration and determine whether or not Mr. Eddie Graziano is guilty or not guilty?
>
> THE CRIER: No response, Your Honor.

(N.T. 3/30/92 at 25-26). This exchange makes clear that not only did the trial court provide a second cautionary instruction, but that it also complied with defense counsel's request to inquire of the jury as to whether they could indeed comply with those instructions. The lack of response from the jury indicated that they could.

The Superior Court, relying upon state law, rejected Petitioner's challenge to the trial court's denial of the motion for mistrial as without merit. (Graziano I at 6, *in* Am. Pet. Appx. Ex. I). The court found that it was not clear that the jury even heard Ms. Marano's statement, and that, in any event, given the prompt and complete curative instruction, the trial court did not abuse its discretion in denying the motion. (Graziano I at 6, *in* Am. Pet. Appx. Ex. I).

Despite the effort made to cure Ms. Marano's single statement and the Superior Court's subsequent rejection of this claim, Petitioner argues that the statement

> fashioned an unforgettable image of Petitioner as someone who did not care at all about the law or human life. Correspondingly, it fashioned him as someone who would not hesitate to kill another person in the exact manner described by the prosecution . . . . [and] when viewed against the factual background of this case . . . made him out to be a cold-hearted, money-grubbing drain on the community.

(Pet. Rep. at 34). Petitioner concludes that the statement "placed unmeasureable [sic] variables into the proceeding and the jury's deliberation to whereas it cannot be said, without grave doubt, [that]

the remark had no substantial and injurious effect or influence" on the trial's outcome. (Am. Pet. Mem. at 101).

Pure speculation notwithstanding, Petitioner fails to show that the Superior Court's rejection of this claim was incorrect, let alone an "unreasonable application" of federal law. The law presumes that jurors follow instructions. *Greer*, 483 U.S. at 766 n.8. Petitioner has failed to show that there existed any "overwhelming probability that the jury [was] unable to follow" the multiple and thorough instructions given by the trial court, *Newby*, 11F.3d at 1147, especially in that the jury, when explicitly asked whether they could do so, gave no indication to the contrary. (N.T. 3/30/92 at 26). More importantly, Petitioner has failed to show that the state court's implicit conclusion that no such "overwhelming probability" existed was itself "objectively unreasonable" under the AEDPA. Accordingly, this unexhausted claim is also without merit.

4. Insufficiency of evidence to support first-degree murder conviction

Petitioner argues that the evidence presented at trial was insufficient to support a conviction of first degree murder. (Am. Pet. at 5; Pet. Rep. at 38). Respondents concede that Petitioner properly raised this claim before the Superior Court, and that it was rejected on its merits. (Am. Resp. at 45). It is, therefore, properly before us and our task is to consider on the merits whether the decision of the state court was "contrary to" or an "unreasonable application of" clearly established federal law standard of review as set out in 28 U.S.C. § 2254(d)(1).

The standard for challenges to the sufficiency of the evidence was set out by the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court held there that the critical inquiry upon such a review was "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. In conducting this review, a court is not

to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but rather is to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19 (emphasis in original). Under this standard, a mere showing that there exists evidence which, if believed, would support a contrary verdict is insufficient and "the evidence does not need to be inconsistent with every conclusion save that of guilt." *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990) (citation omitted). Petitioner thus faces a "very heavy burden" in raising this claim. *See, e.g., United States v. Cothran*, 286 F.3d 173, 175 (3d Cir. 2002).

To sustain a conviction of first degree murder, the Commonwealth was required to prove at trial: (1) that Capocci was dead; (2) that Graziano killed him; and (3) that Graziano did so with the specific intent to kill and with malice. (N.T. 4/6/92 at 30).[24] Petitioner argued to the Superior Court that his testimony, if believed, proved that he only pulled out the gun after being threatened and that it discharged accidentally, and, therefore, that he lacked the intent necessary to sustain the verdict. (Graziano I at 8, *in* Am. Pet. Appx. Ex. I). The Superior Court, however, noted that the jury was free to accept all, part, or none of Graziano's testimony. (Graziano I at 8, *in* Am. Pet. Appx. Ex. I). The court additionally noted that under state law, the jury was free to infer malice and intent from Graziano's use of the gun on a vital part of the victim's body. (Graziano I at 8, *in* Am. Pet. Appx. Ex. I). Accordingly, the court rejected the sufficiency claim. (Graziano I at 8, *in* Am. Pet. Appx.

[24] We recognize that the parties offer somewhat different articulations of first-degree murder in Pennsylvania, both of which contain essentially the same elements. (*Compare* Am. Resp. at 46 *with* Am. Pet. Mem. at 107). We view the definition articulated by the trial judge as not only an accurate and reasonable synthesis of these versions, but as the logical definition to apply in that it was the one upon which the jury was instructed to base its verdict.

Ex. I).

Petitioner argues here that the Superior Court's resolution of this claim was contrary to clearly established federal law.[25] (Am. Pet. Mem. at 107). Again without referencing the Superior Court's disposition of the issue, Petitioner argues that the evidence produced by the Commonwealth at trial "was entirely lacking for any showing that Petitioner deliberately killed the victim." (Rep. Br. at 39). He argues that the only evidence proffered by the Commonwealth as to intent "is that the Petitioner had in his possession the handgun used in the killing, that he drew it and that one shot was fired immediately after he drew it." (Am. Pet. Mem. at 107). While this alone would likely be sufficient to sustain a verdict, the record establishes that there was considerable further evidence. Indeed, the Commonwealth produced four eyewitnesses – Stephanie Marano, Derek Iovacchini, Anthony Spina and Anthony Paccitti – all of whom testified that they saw Graziano deliberately pull out the gun, aim it at Capocci's head, and fire. (*See infra* at 4-5). The use of the weapon on a vital part of Capocci's body was likewise evidence of Graziano's intent to kill. (See N.T. 4/6/92 at 19).

Petitioner additionally argues, by taking out of context an isolated statement at closing, that the Commonwealth itself conceded that it could not prove intent. Petitioner quotes the statement upon which he relies as follows:

> Dominic Capocci died . . . because Eddie Graziano wanted him dead . . . and he killed him. Why did he want them dead? There is no reason for that, I can't tell you . . . that is the mystery in this case, the reason why he killed him.

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[25] In Pennsylvania, the test as to sufficiency of the evidence is the same as under federal law and is not, therefore, "contrary to" clearly established federal law. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1233 & n.6 (3d Cir. 1992) ("[T]he test for insufficiency of the evidence is the same under both Pennsylvania and federal law."). Petitioner's assertion notwithstanding, we assume that Petitioner meant to argue that the Superior Court's analysis was an "unreasonable application" of *Jackson* and we proceed accordingly.

(Am. Pet. Mem. at 108 (citing N.T. 4/3/92 at 104)). Filling in Petitioner's ellipses, however, the complete passage reads as follows:

> There was one reason in this case why Dominic Capocci died, and I will tell you the reason. Because Eddie Graziano wanted him dead. That is why he is dead. He wanted him dead and he killed him. Why did he want him dead? There is no reason for that, I can't tell you, but he wanted him killed. He thought Dominic Capocci needed killing, so he killed him; that is why he is dead. The reason, that is the mystery in this case, the reason why he killed him. He killed him because he wanted him dead.

(N.T. 4/3/92 at 104).

The prosecution, later in the closing, argued that Petitioner was fed up with the attention Ms. Marano had been giving to Capocci.

> She said leave, and [Graziano] said, "Don't even worry about it." Why do you think he said, "Don't even worry about it"? Because he knew that little guy who had been in his path all night every time he tried to talk to this beautiful girl who was hugging and kissing Dominic in the corner not him, not hot blood or passion, it's a nuisance to him, its disrespectful. . . . But he sees Dominic out on the corner talking to Stephanie and he says to himself, I submit, here comes this little guy in the New York Yankees cap again and he is getting on my nerves. Here I am looking swell and handsome, here I am holding my automatic, which is the .380, my loaded automatic, and this little nerdy guy is coming up maybe beating his time. What a nuisance. . . . Stephanie and Derrick were talking, all of a sudden the defendant said something. . . . he stepped back and pulled up his jacket and reached in his pants and pulled out a large gun, he straightened his arm, he aimed it directly at Dominic's forehead, almost right up against it, and he pulled the trigger and Dominic dropped to the ground dead on the spot.

(N.T. 4/3/92 at 109-10).

Taken in their entirety, these passages are anything but a concession that Graziano lacked the necessary intent to kill Capocci. Petitioner's claim that the prosecution conceded that there existed

no intent to kill is, therefore, simply not in any way supported by the evidence.

We have commented extensively upon the evidence offered at trial within (*see* discussion *supra* at 23-28), and we need not repeat it here. Suffice it to say, that there was clearly sufficient evidence to support the verdict.[26] We cannot and will not conclude, especially viewing the evidence in the light most favorable to the prosecution as we must, that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson,* 443 U.S. at 318-19. Petitioner has thus failed to show that the Superior Court's rejection of this claim was incorrect, let alone unreasonable. Accordingly, we recommend that this most frivolous claim be rejected.

B. Ineffective Assistance of Counsel Claims

In Petitioner's remaining claims he asserts that his Sixth Amendment rights were violated due to ineffective assistance of counsel. We first set out the standard by which such claims are considered, and proceed to address them, in turn.

1. Legal Standard

In *Strickland,* 466 U.S. 668, the Supreme Court set out the test that a petitioner must satisfy before a court may find that counsel failed to provide effective assistance under the Sixth Amendment. This same standard has been incorporated by the Pennsylvania courts as the proper basis to consider challenges for ineffective assistance of counsel under the Pennsylvania constitution.

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[26] Petitioner argues that we should view the record absent certain evidence which, he argues, was irrelevant and prejudicial. (Am. Pet. at 11-12). To the extent that he cites evidence that is subject to challenge within this habeas appeal, we will not omit such evidence from our consideration in that we reject his claims. To the extent that he raises new challenges to certain prosecutorial comments, we likewise would not omit this from our consideration in that these claims are unexhausted and not subject to relief. In any event, the evidence in support of his murder conviction remains substantial and overwhelmingly convincing, even absent any of the evidence he would have us omit from consideration.

See Commonwealth v. Pierce, 527 A.2d 973, 976 (Pa. 1987) (stating that Pennsylvania courts apply elements of *Strickland* test to ineffective assistance of counsel claims). Therefore, a Pennsylvania court's resolution of a claim of ineffective assistance is presumed to apply clearly established federal law and is due the substantial deference required by 28 U.S.C. § 2254(d). This leaves us only to determine whether the Pennsylvania Superior Court unreasonably applied the *Strickland* standard here or otherwise based its decision upon an unreasonable factual determination.

Under the two-prong *Strickland* test, a petitioner must show: (1) that his attorney's representation fell well below an objective standard of reasonableness; and (2) that there exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. 466 U.S. at 688-96. To satisfy the first prong of the *Strickland* test, a petitioner must show that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant [or petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (citation omitted).

To satisfy the second prong of the *Strickland* test, a petitioner must show that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* Counsel cannot be ineffective for failing to pursue meritless

claims or objections. *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999).

2. Failure to request "homicide by misadventure" jury instruction

Petitioner argues that trial counsel was ineffective for failing to request that the trial court instruct the jury as to "homicide by misadventure." (Am. Pet. at 3). He argues that the Superior Court's rejection of this claim was "both contrary to and an unreasonable application of *Strickland*." (Am. Pet. Mem. at 44). Respondents concede that this claim was properly raised in state court, but argue that the Superior Court's disposition was a reasonable application of *Strickland*. (Am Resp. at 26-27). In that the Superior Court did, in fact, apply clearly established federal law in rejecting this claim, we must determine only whether that court unreasonably applied the *Strickland* elements in this case.

Petitioner argues that his testimony at trial – that his withdrawing the gun from his waistband was done in self-defense and that the gun's discharge was a pure accident – gave rise to a jury instruction regarding "homicide by misadventure." (Am. Pet. Mem. at 46-50). In light of this testimony, he argues, counsel was ineffective in failing to request that the trial court give this instruction. (Am. Pet. Mem. at 52-53). In analyzing this claim, the Superior Court explained, and Petitioner does not challenge, that under Pennsylvania law:

> Homicide by accidental misadventure is an excusable killing. It comprehends an unintentional and accidental killing while the actor is performing a lawful act unaccompanied by criminal negligence. This defense requires that the act which causes death must be: 1) lawful; 2) done with reasonable care and due regard for the lives of others; and 3) an accident without design or intent.

(Graziano II at 7, *in* Am. Resp. at Ex. D) (citations omitted).

Citing the reasoning of the PCRA court below it, the court found that the facts of Petitioner's

case did not support such a jury instruction. (Graziano II at 7-8, *in* Am. Resp. at Ex. D). Specifically, the court agreed that the facts of the case demonstrated clearly that Graziano "pulled out a handgun on a crowded street corner and shot the victim between the eyes, at close range." (Graziano II at 7, *in* Am. Resp. at Ex. D). The court likewise agreed with the conclusion that "[n]o logical interpretation could ever support a finding that [Graziano] was involved in a lawful act when he caused the death of the victim or that he acted with due regard to the lives of others, especially since the handgun was discharged on a crowded street corner." (Graziano II at 8, *in* Am. Resp. at Ex. D). The court thus concluded that the jury instruction would have been "completely inappropriate" and that counsel could not be deemed ineffective for failing to raise it. (Graziano II at 8, *in* Am. Resp. at Ex. D).

Petitioner argues that the Superior Court's disposition of this claim was improper in that the court failed to give full credence to his trial testimony concerning the drawing of his gun under circumstances which he argued constituted self-defense and would have been a legally justifiable act in Pennsylvania. (Rep. Br. at 25; Am. Pet. Mem. at 45 (citing *United States v. Benally*, 146 F.3d 1232, 1236 n.4 (10 Cir. 1998)).[27] He concludes that the court improperly assumed the role of the jury and on its own and found the instruction to be incompatible with the facts of the case. (Am. Pet. Mem. at 44). He thus argues that the court's finding – that the underlying state law claim was meritless – was erroneous.

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[27] We note that this case, and others which Petitioner cites for support, dealt with a prosecution which arose under federal law, and it is not clear as to whether the same rule applies to the state courts. Additionally, Petitioner has failed show that the proposition for which he cites this case has been "clearly established by the Supreme Court of the United States" as it must be under 28 U.S.C. § 2254(d)(1). Accordingly, even if the state court had indeed failed to "give full credence" to Graziano's testimony, a claim which is dubious in itself, we doubt this would provide a ground for habeas relief.

The Supreme Court of the United States has ruled, however, that state courts are the final arbiters of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "[F]ederal habeas corpus relief does not lie for errors of state law . . . it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Id.* (citations and quotations omitted). As a habeas court, therefore, we are in no position even to consider whether the state appellate court ruled properly in its conclusion that, as a matter of state law, Petitioner was not entitled by the facts of his case to the desired jury instruction. Accordingly, we must accept the Superior Court's determination on this issue.[28]

Our acceptance of the Superior Court's conclusion that the challenge to the underlying instruction lacked merit, of course, leaves Petitioner unable to show that he suffered prejudice as a result of counsel's failure to request this jury instruction. Petitioner thus fails the second prong of the *Strickland* standard, and, in that counsel cannot be presumed to act unreasonably in failing to raise a meritless claim, *see Sanders*, 165 F.3d at 253, he fails the first prong of the *Strickland*

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[28] We note that, in any event, the Superior Court was correct in its ruling that the instruction was inappropriate. Petitioner argues that self-defense is legal in Pennsylvania and that he was thus acting in a legal manner at the time that he withdrew the weapon (*see, e.g.*, Pet. Rep. at 25), but conveniently ignores the fact that his very *possession* of the gun was illegal. (*See, e.g.*, N.T. 4/7/92: Petitioner found guilty of illegally "carrying firearms on public streets or public property"). Accordingly, by no stretch of the imagination could Graziano's actions on the morning of August 15, 1991, even accepting his version of the facts, be said to have been lawful, and he thus fails to satisfy the first element of homicide by misadventure. Additionally, as the Superior Court noted, Graziano withdrew the weapon with a number of people in the immediate vicinity. (Graziano II at 8, *in* Am. Resp. at Ex. D). The court's implicit conclusion that Graziano's action thus could not have been "done with reasonable care and due regard for the lives of others" under the second element of the defense is likewise clearly correct. Accordingly, in that counsel cannot be found ineffective for not pursuing a meritless claim, *Sanders*, 165 F.3d at 253, counsel could not be found ineffective here.

standard. Accordingly, this ineffectiveness claim must be rejected.[29]

3. Failure to impeach coroner's testimony regarding the distance of the gunshot and the victim's behavior at the time of the shooting

Petitioner argues that he received unconstitutionally ineffective assistance of counsel due to Attorney Grimes's failure to "present the testimony of an expert forensic pathologist at trial to establish that the wound in this case was neither a contact or close range wound and/or that the behavior of the victim would have been neither 'mellow' [n]or 'non-aggressive' . . . ." (Am. Pet. at 4). He further argues that the Superior Court's rejection of this claim was "contrary to and involves an unreasonable application of" *Strickland*. (Am. Pet. Mem. at 56). Respondents concede that this claim was properly raised in state court, but argue that the Superior Court's disposition was a reasonable application of *Strickland*. (Am Resp. at 28). In that the Superior Court did, in fact, apply clearly established federal law in rejecting this claim, we must only determine whether the Pennsylvania Superior Court unreasonably applied the *Strickland* elements in this case. We recognize this claim as containing two independent aspects, and address them accordingly.

Regarding the first aspect, the distance of the shooting, the Superior Court found, first, that

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[29] Petitioner also argues that the Superior Court's disposal of this ineffectiveness claim was improper due to the court's proceeding straight to *Strickland*'s prejudice prong, without first deciding "whether or not trial counsel's omission [passed] muster under the standard of 'reasonableness.'" (Am. Pet. Mem. at 44). This point is of no consequence, however. In *Strickland*, the Court admonished that although it had discussed the performance prong of an ineffectiveness claim prior to the prejudice prong, a reviewing court was not required "to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697. Specifically, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

counsel, rather than calling his own expert to the stand, reasonably relied upon his cross-examination of coroner Dr. Preston, which reinforced that the distance of the gunshot was "indeterminate" and that he was unable to conclude whether or not it was a close shot. (Graziano III at 4, *in* Am. Pet. Appx. Ex. G; *see also* N.T. 4/1/92 at 74: ". . . we found evidence that this may have been a contact wound, but there was also evidence it could have been a distant wound. That is why in my report I said indeterminate."). The court found, further, that Graziano "failed to demonstrate prejudice in light of the abundance of eyewitness testimony against him, apart from the expert testimony in question." (Graziano III at 4, *in* Am. Pet. Appx. Ex. G). The court thus concluded that this aspect of Petitioner's ineffectiveness claim lacked merit. (Graziano III at 4, *in* Am. Pet. Appx. Ex. G).

Regarding the second aspect of this claim, Capocci's behavior at the time of the shooting, the Superior Court found that Attorney Grimes had once again relied upon his cross-examination of Dr. Preston "who conceded that the effects of alcohol include behavior which is the opposite of mellow and non-aggressive, and that [he] had no evidence that would indicate that the victim was actually in a mellow state at the time of the shooting." (Graziano III at 5, *in* Am. Pet. Appx. Ex. G). Furthermore, the court found that trial counsel relied on the surveillance videotape from the Biarritz in attempting to establish that Capocci was not in a mellow or non-aggressive state in the moments immediately before the shooting. (Graziano III at 5, *in* Am. Pet. Appx. Ex. G). The court thus concluded that trial counsel's strategy with regard to this aspect of the ineffectiveness claim was not unreasonable and rejected it. (Graziano III at 5, *in* Am. Pet. Appx. Ex. G).

Petitioner argues that the Superior Court "missed the glaring prejudice resulting from counsel's failure to present an expert witness." (Am. Pet. Mem. at 56). Specifically, Petitioner argues that Dr. Taff's testimony would not only have impeached the coroner's testimony on these

two issues, but "would have, in domino effect, also impeached the abundance of eyewitness testimony against the Petitioner, and undermined the Commonwealth's case in chief. It is reasonably certain that, as a result the jury would have disbelieved those alleged eyewitnesses and believed the Petitioner instead." (Am. Pet. Mem. at 56-57). He argues, additionally, that the testimony would have likewise left the prosecution unable to argue these points as persuasively at closing.[30] (*Id.*).[31]

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[30] The District Attorney argues that the prosecution-argument aspect of Petitioner's ineffectiveness claim is unexhausted. (Am Resp. at 28). We view this argument not as a free-standing claim, however, but as an argument offered to show why counsel's failure to call an expert on these points was unreasonable. In any event, this argument makes no difference to our analysis, as the prosecution would have remained free to argue any fair inferences resulting from Dr. Preston's testimony and the abundance of eyewitness testimony, even if Dr. Taff had been called and had directly contradicted Dr. Preston. *See United States v. Sullivan*, 803 F.2d 87, 91 (3d Cir. 1986) (noting principle that prosecution is free to "ask the jury to draw permissible inferences from anything that appears in the record" (quoting *Oliver v. Zimmerman*, 720 F.2d 766, 770 (3d Cir. 1983))).

[31] Petitioner also quibbles with certain assertions offered by Attorney Grimes at the PCRA hearing. For instance, in response to Attorney Grimes's assertion as to the evidentiary value of the contents of the Biarritz surveillance videotape, Petitioner argues that the silent, black and white video footage, in fact, "reveals nothing at all about anyone's demeanor" prior to the shooting. (Am. Pet. Mem. at 58).

Our independent review of the videotape confirms that it is indeed impossible to determine what anybody said, and difficult to determine with any certainty what sort of mood anybody was in. However, the video does show Ms. Marano sitting next to and, at various points, interacting with Graziano. (*See, e.g.*, Biarritz videotape at 0:04 minutes (corresponding to Hope Myers N.T. 3/31/02 at 123); 0:37-38 minutes (corresponding to Hope Myers N.T. 3/31/02 at 129-30 and showing Capocci sitting diagonally across the bar from Graziano and Ms. Marano); 0:44 minutes; 0:46 minutes). The videotape likewise shows extended interaction between Capocci and Ms. Marano during which they can be seen alternately hugging and kissing, and, at other points, may or may not be arguing. (*See, e.g.*, Biarritz videotape at 0:02 minutes (corresponding to Hope Myers N.T. 3/31/02 at 121); 0:09-15 minutes (corresponding to Hope Myers N.T. 3/31/02 at 124-26); 0:50-1:04 hours (corresponding to Hope Myers N.T. 3/31/02 at 131-35); 1:25-28 hours (corresponding to Hope Myers N.T. 3/31/02 at 142-44)). In any event, we are satisfied that the contents of the videotape fairly enabled Attorney Grimes to plausibly argue, as he did in closing, that Capocci saw Ms. Marano talking to Graziano and became jealous, that he was therefore arguing with her at various points, and thus was not in a mellow state prior to the shooting, and that he ultimately made a conscious decision to angrily confront

(continued...)

As set out above (*see* discussion *infra* at 23-29), Petitioner overstates the strength of Dr. Taff's testimony as to both aspects. Proceeding with the distance aspect first, to the extent that Petitioner argues that Dr. Taff's testimony supports Petitioner's own trial testimony on this point – that Capocci was five to six feet away from him when the gun accidentally discharged – we note that Dr. Taff only proffered an estimate that the gunshot wound was sustained from a distance of "two feet or beyond" and explained that it was, in fact, impossible to draw a conclusion as to the actual distance. (N.T. 4/1/92 at 21-22, 53, 67-69). Dr. Taff's equivocal testimony thus does little to establish that the shooting, in fact, occurred from a distance of five to six feet, as Petitioner argues that it would. (Am. Pet. Mem. at 56-57). Further, although this testimony is not inconsistent with Petitioner's testimony on this point, neither was Dr. Preston's testimony that the distance was "indeterminate." (N.T. 4/1/92 at 74). Dr. Taff's estimate of a distance of two feet or more does not contradict, and thus would not have served to impeach, Dr. Preston's conclusion on this point.

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[31](...continued)
Graziano on the street corner. (*See, e.g.*, N.T. 4/3/92 at 41-45). That this strategy did not carry the day is of no moment, and counsel's decision to rely on the videotape to make this argument to the jury rather than calling an equivocal expert to the stand is precisely the sort of trial strategy that *Strickland* warns against second-guessing. *See* 466 U.S. at 689.

Petitioner also argues that counsel did not actually utilize the videotape during Dr. Preston's testimony. (Am. Pet. Mem. at 58). This misses the point however, as it is of no moment *when* counsel actually showed the videotape (it was shown during the examination of Hope Myers). The salient point is that the jury *did see* the videotape and that counsel referred back to the videotape in closing, which arguably showed what counsel argued that it showed.

Finally, Petitioner argues that counsel failed to explain to the jury "that the video rebutted or was being used to rebut the contentions of the victim's mellowness." (Am. Pet. Mem. at 58). This argument is simply incorrect, however, in that counsel most certainly *did* make this connection in closing. (*See, e.g.*, N.T. 4/3/92 at 42-43: "Now Dominic has to be getting more upset. . . . they are back over where they were [earlier], but it's not as much holding, hugging, if you really look at [the video], there is finger pointing, gesturing, arguing. You can see it, we just can't hear it, so we have to infer what is going on. So Dominic has to be getting concerned. . . . So now what happens is Dominic does leave the bar area because he is mad . . . .").

To the extent that Petitioner argues that Dr. Taff's testimony would have discredited the testimony of the Commonwealth's four eyewitnesses, he likewise overstates this point. In fact, the Commonwealth's witnesses, as a whole, established only that the shooting occurred from a distance of anywhere between less than one foot to a distance of four feet. (*See infra* at 25). Dr. Taff's testimony that the shooting occurred from a distance beyond two feet, therefore, may have contradicted the testimony of one eyewitness, but would have been consistent with the testimony of two others. (*See infra* at 25). We are thus satisfied that Petitioner suffered no prejudice as a result of counsel's decision not to call an expert on this issue.

Most importantly, establishing a "distant shot" would have actually been inconsistent with Petitioner's own defense trial strategy. As Attorney Grimes testified at the PCRA hearing, a showing of a greater distance would have undermined the defense strategy, in that it would have presented Graziano with an avenue of escape inconsistent with self-defense, Graziano's stated reason for pulling the gun in the first place.

> The defense in the case was that Eddie was surrounded by this group of youths and that one of them was jealous because of a girl that was sort of pursuing Eddie at the club and so in one respect it was important for us for those people including the deceased to be close to Eddie because he would otherwise be able to retreat, be able to leave the scene if they weren't surrounding him, so it was important for us to have everyone close . . . .

(N.T. 6/27/02 at 83). Further, in addition to being inconsistent with the proffered defense in general, in Attorney Grimes's opinion, a distant shot would have made the shot appear measured and accurate, and would have thus served to *reinforce* a showing of specific intent to kill. (*See* N.T. 6/27/02 at 98). We find these conclusions to be, at the very least, reasonable and we will not second-guess them here. Accordingly, we are satisfied that the Superior Court's disposition of this aspect

of Graziano's ineffectiveness claim was not an unreasonable application of *Strickland*.

As to the second aspect of this claim, Capocci's mental state, Petitioner argues that Dr. Taff's testimony "would have strongly supported Petitioner's defense that the victim was the aggressor as his blood alcohol indicated" (Rep. Br. Supp. at 3). It is the case, however, that Dr. Taff's testimony, in fact, only makes clear that the blood alcohol content could have been indicative of a number of different mental states. As Dr. Taff explained, Capocci "could have been excited, he could have been happy. He may also have been sleepy, but it depends on his personality, his custom of drinking and the social environment in which he's at the time." (N.T. 6/27/2002 at 24). In the end, he was unable to conclude what Capocci's behavioral mood *actually* was at the time of his death, and, importantly, confirmed that Dr. Preston's opinion on this point was, at the very least, consistent with the eyewitness testimony. (N.T. 6/27/02 at 61, 63-64). Dr. Preston, on the other hand, conceded on cross-examination that he had not viewed any evidence in the case consistent with his opinion that Capocci would likely be in a "mellow" state, that someone with a lower level of intoxication could likewise become "more verbose or active," and that, in any event, all of these potential states occur over a broad range of blood alcohol levels – from .05 to .40. (N.T. 4/1/92 at 78-80). Petitioner's claim to the contrary notwithstanding, Dr. Taff's testimony on this point would have served as little more than equivocal expert impeachment testimony in response to equivocal expert testimony. Under these circumstances, counsel's decision to rest on the concessions elicited on cross-examination was entirely reasonable.

Dr. Taff's testimony would likewise have served as little more than a weak response to the unequivocal testimony of six eyewitnesses who interacted with Capocci throughout the night and in the immediate moments preceding the shooting and testified that he had been happy and in a good

mood throughout the entire night. (*See infra* at 27 n. 20). Petitioner's own witness, Anthony Piazza, a loyal friend who both fled the scene and shared a cab with Petitioner immediately after the shooting (N.T.4/2/92 at 28-33) testified that Capocci had been in a peaceful and happy mood the entire time, and pertinently, at the end of the night. (N.T. 4/2/92 at 24, 26). Indeed, Petitioner himself admitted that Capocci seemed to him to be "happy, well behaved and peaceful . . . like he was in a good mood." (N.T. 4/2/92 at 129).

Accordingly, we are not persuaded that Attorney Grimes's decision not to call an expert to rebut either point was unreasonable. We are likewise not persuaded that calling an expert would have made any difference. Indeed, Dr. Taff's testimony would have, in certain areas, contradicted Petitioner's own defense strategy. The Superior Court's rejection of this ineffectiveness claim was thus plainly reasonable. We recommend that the claim, therefore, be rejected.[32]

4. Failure to object to "prosecutorial misconduct" in closing argument

Petitioner argues that trial counsel was ineffective for failing to object to certain alleged instances of "prosecutorial misconduct." (Am. Pet. Mem. at 74; Rep. Br. at 29). In support of this claim, he points to four specific comments made by the prosecution during closing argument: (1) likening Petitioner to "Arnold Schwarzenegger" and "the Terminator;" (2) characterizing Petitioner as "a cold-blooded, calculated killer;" (3) telling the jury that if they believed Petitioner's testimony

[32] To the extent that Petitioner argues that counsel's failure to investigate potential experts such as Dr. Taff undermines counsel's effectiveness (*see, e.g.*, Am. Pet. Mem. at 70-72), we disagree. As discussed, counsel had valid strategic reasons to rely on the videotape footage and cross-examination. However, even were we to assume, *arguendo*, that counsel's failure to investigate was unreasonable under the first *Strickland* prong, Petitioner remains unable to show prejudice in light of the reasons discussed above, not the least of which are that such testimony would have contradicted aspects of Petitioner's own testimony and undermined the defense strategy in general.

as to how he came into possession of the gun, he had "a bridge to sell [them] up in Brooklyn;" and (4) telling the jury that, based on his experience in prosecuting murder cases, Petitioner was a first-degree murderer. (Am. Pet. Mem. at 74; Rep. Br. at 29).[33] Respondents concede that this claim was properly raised in state court, but argue that the Superior Court's disposition was a reasonable application of *Strickland*. (Am Resp. at 34). In that the Superior Court did, in fact, apply clearly established federal law in rejecting this claim, we must only determine whether the Pennsylvania Superior Court unreasonably applied the *Strickland* elements in this case. We begin by setting out, as we are required to do, *see, e.g., United States v. Young*, 470 U.S. 1, 11-12 (1985), the context in which these comments were made, and bolding for emphasis the precise statements which Petitioner argues counsel should have objected to.

Attorney Grimes, in his closing, attempted to portray Petitioner in a sympathetic light; as a boy who became scared once Capocci charged him and that he had been motivated by fear when he fled the scene and, eventually, the state. He explained to the jury:

> You have to keep in mind in this case that we are dealing with kids. They are kids not trying to be kids, they are trying to be something else, trying to be grown-ups . . . They are all twenty years old, they are not supposed to be in that bar. . . . They are all there trying to be grown-ups earlier than perhaps they ought to be grown-ups, but what happened in this case is, in the end, Mr. Graziano flees, as apparently does everybody else. They all run, but most come back. Mr.

[33] We recognize that Petitioner also argues that the entire closing argument was improperly "extremely emotional." (Am. Pet. Mem. at 74). The state courts, however, did not address this aspect of the closing in disposing of the claim, and we are unable to determine that Petitioner raised this aspect of the closing argument before them. Accordingly, this aspect of the claim is unexhausted and procedurally defaulted. In any event, even were we to address the merits of this aspect of the claim, the cold transcript does little to reveal any emotion displayed by the prosecution during closing argument. In any event, Petitioner has not shown that the trial was "so infect[ed] . . . with unfairness as to make the resulting conviction a denial of due process." *Greer*, 483 U.S. at 765 (quotation omitted).

> Graziano flees. . . . I say that fact alone is not evidence of anything other than the level of fear he had on that corner. . . . So that evidence is not evidence that he believes he did something wrong, it shows the degree of fear he has, not just for what happened to this person, but for what may happen to him because of all of his friends that have seen it. . . . He believes, rightly or wrongly, that these guys from South Philly and the aura of these guys from South Philly – and he knows it because he is from South Philly, that they have this aura – that they are going to take care of him because of what happened there, this is their friend . . . . that is what motivates him to flee.

(N.T. 4/3/92 at 35-37).

In response to this assertion, the prosecution argued in closing that Petitioner was not quite such a sympathetic character. He argued specifically:

> This is not some babe in the woods, ladies and gentlemen of the jury. Do you recollect Mr. Grimes was telling you he fled out of fear, he was afraid, that is why he fled, like he is Peewee Herman or something. This isn't Peewee Herman, this is **Arnold Schwarzenegger, this is the Terminator**, he is not afraid of nothing [sic]. . . . The defendant, when he is at the scene, he has the gun and he knows he is going to use it. When he shoots Dominic Capocci, I have no idea what kind of gun he has, so I ask him, at my peril, I ask him, I submit a **cold-blooded, calculating killer**, you tell me . . . .

(N.T. 4/3/92 at 70, 78).

The prosecution likewise sought in closing to rebut Petitioner's testimony that his possession of the murder weapon had been mere happenstance, and the result of his doing a favor for a friend.

> I want to know if this is an accident or if this is intentional. So let's see. [I ask Graziano] Your gun? No, Mr. McGovern, I got it from the mysterious John Milnes. I knew no John Milnes was going to show up. Does he think I just fell off a bus from Iowa? Do you believe for one moment that there is some guy named John at the Aztec [Club] who came up to him and said Ed, I got a problem, I got this loaded automatic and my girl, you know how girls are about guns, they're funny about them, I'm sure your girl is funny about your automatic, so can you take my automatic for me? And Eddie says sure. . . . Loaded automatic? I carry them all the time. Might be able to return

> the favor sometime. I'll make room for it right next to mine. Pipe dream. **If you think there is a John Milnes, I got a bridge to sell you up in Brooklyn**. But that is what he tells you, so that is where he gets the gun from, this guy John Milnes.

(N.T. 4/3/92 at 78-79).

Finally, at the end of his closing, Attorney Grimes suggested to the jury that there existed videotape footage of the street corner where the shooting occurred, and further suggested to them that it would behoove them to see such footage before reaching a guilty verdict.

> As you are sitting there you have now heard your fellow jurors, you have all listened, you have all expressed your opinion and you are getting ready to say what happened, you are getting ready to render your verdict, and as you are getting ready to render your verdict you are thinking about what happened on that corner and you think maybe I have this figured out, this is what I think happened, and then you find out there is a videotape of the corner. Do you need to see the videotape to know what happened?

(N.T. 4/3/92 at 61-62).[34] An immediate objection from the prosecution was sustained. (N.T. 4/3/92 at 62). Nonetheless, the prosecution sought in closing to counter any suggestion that such a tape existed.

> So Mr. Grimes liked this videotape to the point that at the end of the trial he said to you, If [sic] Mr. McGovern calls four eyewitnesses of his own who say there was no fight on the corner, there was people [sic] standing still and there was my client administering an execution to Dominic Capocci, and Anthony Piazza says there was no commotion on the corner and there is no alarm, no fight, geez, don't you wish we had a videotape of that murder? Well, ladies and gentlemen of the jury, **I have been trying murder trials for about five years now, six years**, and I haven't seen a videotape of a murder yet, and I think it's because they don't call us before they kill somebody. If they would just call us, we'd be more than happy to take a Camcorder, go where they are going to kill somebody and videotape it. . . . They are saying geez, maybe I can suggest to the jury

[34] The record does not indicate whether or not such a tape actually existed.

> if Mr. McGovern had a videotape, that would be enough. . . . But murderers don't do that. Do you know what murderers do? I will tell you what murderers do. They shoot the victim, then they look at the victim. Then they cooly and calmly walk away while everyone else is frozen in horror, while everyone is in shock they are cool. They walk to not draw attention to themselves, then when they are a certain distance away, they begin to run. . . . But a murderer doesn't get videotaped. . . . killers don't always count on everything. Then what they do is they take the cab and get right off the main street as fast as possible. They get onto 12th Street, and if they are claiming self-defense, if somebody was just trying to kill them, if the person was innocent, if they saw a cop they'd say Cabbie, flash your lights, honk your horn, there's a cop, I want to tell him what just happened, I was almost killed, I'm an innocent man. That is what an innocent man does. An innocent man doesn't glare and cooly walk away. An innocent man falls to his knees and cries, and cries. . . . An innocent man goes to the police and says this horrible thing just happened. I shot someone. I think they were trying to hurt me. A killer, when he sees the cop car, says, make a left down a one-way street that is coming right . . . . Then what the killer does, I submit, is he says to himself: How many people saw me shoot that boy at point-blank range between the eyes? Lots. Get out of town.

(N.T. 4/3/92 at 94-97).

Addressing this claim at the state court level, the Superior Court noted that under applicable state law, objections to the disputed comments may lead to reversal only where "the unavoidable effect of such comments would be to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they could not weight the evidence objectively and render a true verdict." (Graziano III at 5, *in* Am. Pet. Appx. Ex. G). The court concluded that the record supported the PCRA court's reasoning and conclusion that the disputed comments did not meet this standard. (Graziano III at 6, *in* Am. Pet. Appx. Ex. G).

At the PCRA level, the court addressed the "Arnold Schwarzenegger"/"Terminator" comments first and found that they were made as a clear contrast to defense counsel's

characterization of Graziano as a meek figure. (PCRA II at 8, *in* Am. Resp. Ex. E). The court found that the allusion fell squarely within the state's "doctrine of fair response." (PCRA II at 8, *in* Am. Resp. Ex. E). Addressing the "cold-blooded, calculating killer" next, the court found that similar (and arguably worse) comments had been upheld under prior state caselaw where they were "supported by the evidence and [were] not made in a deliberate attempt to destroy the objectivity of the factfinder." (PCRA II at 8-9, *in* Am. Resp. Ex. E). In denying the claim, the court implicitly found that the prosecution's comment did not meet this standard. Next addressing the "bridge to sell you up in Brooklyn" comment, the court found this was "merely a rhetorical way" of responding to Graziano's claim as to how he came into possession of the gun and expressing that the claim "was on its face incredible." (PCRA II at 9, *in* Am. Resp. Ex. E). Finally the court addressed Graziano's claim (based on citation to the same pages as the final quoted excerpt above) that the prosecutor had argued to the jury that, based on his own experience as a murder prosecutor, he was sure that Graziano was a murderer. The court found that the prosecutor's argument here simply constituted a summary of the actions actually taken by Graziano immediately after the shooting in support of the Commonwealth's contention that those actions "were those of a murderer and not those of a man who had accidentally shot someone." (PCRA II at 9, *in* Am. Resp. Ex. E).[35] The court concluded that none of these comments had "the unavoidable effect of prejudicing the jurors by forming a fixed bias and hostility towards the accused such that they cannot render a fair verdict" and thus did not warrant a new trial under applicable state law. (PCRA II at 9-10, *in* Am. Resp. Ex. E). Accordingly, the court found that trial counsel could not be deemed ineffective for failing to object to them.

[35] The court did not note that the prosecution, in addition to summarizing Graziano's actions after the shooting, sought in the cited passage to rebut defense counsel's suggestion of the existence of a videotape of the shooting.

(PCRA II at 10, *in* Am. Resp. Ex. E).

Petitioner, in support of this claim on habeas appeal, points to Attorney Grimes's PCRA hearing testimony that he did not object to any of these comments because he did not find it to be in Graziano's interest "to be viewed [by the jury] as being obstreperous" by interrupting the prosecutor during his closing argument. (Am. Pet. Mem. at 74; Rep. Br. at 29) (citing N.T. 6/27/02 at 95-97). Petitioner argues that this reasoning cannot constitute a legitimate basis for not objecting to the above disputed comments, and that counsel's performance, therefore, was deficient. (Am. Pet. Mem. at 74; Rep. Br. at 29). He concludes that the state court's decision to the contrary was thus an unreasonable application of *Strickland*. (Am. Pet. Mem. at 75).

Petitioner, however, misses the fact that neither the Superior Court, nor the PCRA Court below it, relied upon counsel's reasoning in rejecting the claim.[36] Rather, the courts found that the underlying disputed prosecutorial comments could not give rise to relief, and that counsel could not be ineffective for failing raise a meritless claim. (PCRA II at 10, *in* Am. Resp. Ex. E; Graziano III at 5-6, *in* Am. Pet. Appx. Ex. G). This is clearly a reasonable conclusion under federal law, *see Sanders*, 165 F.3d at 253, and Petitioner is thus unable to show that this conclusion is an unreasonable application of *Strickland*.[37] Accordingly, we recommend that this claim be rejected.

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[36] Nonetheless, we independently accept counsel's explanation as being reasonable.

[37] Petitioner nowhere challenges the state court determinations that the underlying disputed prosecutorial comments would not give rise to a new trial under applicable state law. Even if he had, however, this is precisely the sort of state court determination of state law that we are precluded from re-examining. *See Estelle*, 502 U.S. at 67-68. To the extent that Graziano could argue that applicable state law mirrors federal law and that the court's disposition thus constitutes a disposition of the federal law merits, we note that the state court determination was plainly reasonable in any event, given the context in which the challenged comments were made. The Supreme Court has recognized the "invited response" rule, into which the "Arnold

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5. Failure to object to testimony from prosecution witnesses that they had identified Petitioner from police photographs [38]

Petitioner argues that trial counsel was ineffective for failing to object to testimony from several Commonwealth witnesses that they had identified Petitioner from police photographs at the police station in the hours after the shooting. (Rep. Br. at 37; Pet. at 9). The District Attorney argues that the claim is procedurally defaulted (Resp. at 34-35), and Petitioner argues in response that the claim was fairly presented to the state courts and alternately, if not, that the resulting default should be excused due to a showing of cause and prejudice (Rep. Br. at 35-36).

In arguing that the claim was, in fact, fairly presented to the state courts, Petitioner points to five pages of argument contained within his brief to the Superior Court on direct appeal in which, he argues, he raised this claim. (Rep. Br. at 35-36). In addressing the points raised in the brief, however, the Superior Court found that Graziano had failed "to set forth with any specificity the conduct which forms the basis of his ineffectiveness claim" and had likewise failed to develop the

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[37](...continued)
Schwarzenegger"/"Terminator" and the "bridge to sell you up in Brooklyn" comments clearly fall. *See Young*, 470 U.S. at 11-13 (citing *Lawn v. United States*, 355 U.S. 339, 359-60, n.15 (1958)). The final cited excerpt likewise falls into this category, as the prosecution was clearly responding to defense counsel's suggestion that there existed pertinent videotape footage of the shooting which was being kept from the view of the jury – evidence which had not been admitted into the record, if it existed at all. As to the "cold-blooded, calculating killer" comment, we note that a prosecutor is permitted to "prosecute with earnestness and vigor," *Young*, 470 U.S. at 7 (quotation omitted), and a conclusion that the comment was not so egregious that it "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process," *Greer*, 483 U.S. at 765 (quotation omitted), is plainly reasonable as well.

[38] Petitioner raised this claim in his initial habeas petition, but failed to reference it in either of his supplemental pleadings or in his Amended Petition. In that the argument is raised in the counseled Reply Brief to the Attorney General's amended response, however, we give Petitioner the benefit of the doubt, assume that he did not intend to abandon this claim, and we address it accordingly.

claim "in any specific fashion, or to support it with relevant case law" and thus refused to consider the merits of the claim. (Graziano I at 7, *in* Am. Pet. Appx. Ex. I). This claim, therefore, was not properly exhausted, but rather was denied on an adequate and independent procedural state law ground, and we may not review it absent a showing of cause and prejudice or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 749-50.

Petitioner argues that he nonetheless satisfies the cause and prejudice standard. Specifically, he argues that to the extent that both appellate and PCRA counsel failed to raise this claim on appeal, such failure would constitute "cause" for the default. (Rep. Br. at 36). He further argues that he suffered "prejudice" as a result of such failure in that there existed, he argues, "plainly obvious" state court precedent that the admission of the disputed testimony constituted reversible error. (Rep. Br. at 36). He thus concludes that counsel's failure to raise this claim should excuse the procedural default.

As discussed, attorney error rising to the level of a Sixth Amendment violation under *Strickland* may indeed establish cause. *See Carrier*, 477 U.S. at 488. Importantly, however, such ineffectiveness must first have been properly presented to the state courts as an independent claim. *See id.* at 488-89; *Edwards*, 529 U.S. at 452. Additionally, the Supreme Court has held that a petitioner has no federal constitutional right to counsel when asserting collateral attacks upon his conviction. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Rather, a petitioner's "right to appointed counsel extends to the first appeal of right, and no further." *Id.* It follows that because a petitioner has no federal constitutional right to counsel at the PCRA level to begin with, there can be no constitutional violation if counsel was ineffective. Indeed, this rule has been codified in 28 U.S.C. § 2254(i), which plainly states: "The ineffectiveness or incompetence of counsel during

Federal or State collateral post-conviction proceedings shall not be a ground for relief" in a habeas proceeding. It likewise follows that such ineffectiveness cannot, therefore, constitute "cause" excusing a procedural default.

Graziano never raised such a claim of ineffective appellate assistance in the state courts, nor did he raise any allegation as to ineffective assistance of PCRA counsel. Such a claim, in any event, could not give rise to a federal ineffectiveness claim and could likewise not constitute cause to excuse the procedural default even if he had. Accordingly, the alleged ineffective assistance does not constitute "cause" excusing his procedural default of this claim. We recommend that this procedurally defaulted claim be rejected.[39]

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[39] In finding that Petitioner is unable to establish cause for the procedural default, we need not determine whether he is able to establish "prejudice." *See Strickland*, 466 U.S. at 697. To determine whether such prejudice existed, however, we note that this would require us to be in the awkward position of being the first court at any step of Petitioner's appeals process to pass upon the question of whether the facts of his case give rise to relief under applicable state law. This situation gives rise to two concerns – the concern for comity underpinning the exhaustion requirement, *see, e.g., Rose v. Lundy*, 455 U.S. 509, 518 (1982), and the concern that a habeas court is not to grant relief due to an error in the application of state law, *see Estelle*, 502 U.S. at 67-68.

Nonetheless, we recognize that Petitioner cites the Pennsylvania Supreme Court's decision in *Commonwealth v. Allen*, 292 A.2d 373 (Pa. 1972) as the basis for his argument that he was prejudiced by appellate/PCRA counsel's failure to raise the underlying ineffectiveness of trial counsel claim. (Pet. Rep. at 37). He argues that, in *Allen*, the court ruled that admission of testimony regarding photographic identifications made at a police station has the "presumed effect of . . . predispos[ing] the minds of the jurors to believe the accused guilty and thus effectually to strip him of the presumption of innocence" and that when prior criminal activity on a defendant's part could be reasonably concluded from the photographic reference, "prejudicial error has been committed." (Pet. Rep. at 37) (citing 292 A.2d at 375). He concludes that the facts of his case would have given rise to relief, that trial counsel was ineffective for failing to raise this claim, and that appellate/PCRA counsel were, in turn, ineffective for failing to raise trial counsel's ineffectiveness.

We note, however, that the Pennsylvania Supreme Court has clarified and, to a certain extent circumscribed, *Allen*'s scope. As the court explained in *Commonwealth v. Washington*, cases subsequent to *Allen* made clear that "mere passing references to photographs do not

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6. Failure to preserve claims

Petitioner finally argues that appellate and PCRA counsel were generally ineffective to the extent that they failed to raise any of the aforementioned claims. (Am. Pet. Mem. at 24, 41-42). Petitioner nowhere provides any substance in support of this claim, and nowhere in the record is there evidence that Petitioner exhausted such a claim in the state courts. Accordingly, this claim is procedurally defaulted. Petitioner provides no argument as to cause and prejudice or a miscarriage of justice so as to excuse this default, and we find none on our own. Accordingly, we recommend that this unexhausted and unsupported claim be rejected.[40]

C. Certificate of Appealability

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. Under 28 U.S.C. § 2253(c)(2), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." When a federal court rejects a

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[39](...continued)
amount to reversible error" and that "reversal is unwarranted where the jury could only surmise prior criminal conduct based upon gross speculation." 927 A.2d 586, 606 (Pa. 2007) (citing *Commonwealth v. Riggins*, 386 A.2d 520, 524 (Pa. 1978) and *Commonwealth v. Carlos*, 341 A.2d 71, 73 (Pa. 1975)). Rather, the court ruled, "it is only those references that expressly or by reasonable implication also indicate some involvement in prior criminal activity that rise to the level of prejudicial error." *Id.* at 605 (citing *Commonwealth v. Young*, 849 A.2d 1152, 1156 (Pa. 2004)). Nothing in the record indicates that there was any such implication (indeed, the trial court disallowed a proffer of a prior conviction for Violation of the Uniform Firearms Act (*see*, N.T. 4/3/92 at 11-15)).

[40] We recommend, however, that this claim be rejected on its merits, notwithstanding the procedural default, to the extent that it argues that we find PCRA counsel to be ineffective, in that habeas relief does not lie for ineffective assistance of collateral appellate counsel. *See* 28 U.S.C. § 2254(i).

petitioner's constitutional claims on the merits, "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In other words, the petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

Here, for the reasons set forth above and in light of the clear authorities discussed above, we do not believe a reasonable jurist would conclude that the Court incorrectly denied the present petition. Accordingly, a COA should not issue.

Our recommendation follows.

IV. RECOMMENDATION

AND NOW this 29th day of April, 2008, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED**. It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE** in that we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right or that a reasonable jurist would debate the correctness of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD GRAZIANO, Petitioner, v. JAMES L. GRACE, SUPERINTENDENT, et al., Respondents.	: : : : : : : :	CIVIL ACTION NO. 05-2300

O R D E R

AND NOW, this day of , 2008, upon careful and independent consideration of the petition for a writ of habeas corpus, the amended petition for a writ of habeas corpus, the responses thereto, and Petitioner's reply and supplement reply to the response, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE**;

3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right or demonstrated that a reasonable jurist would debate the correctness of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and

4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

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TIMOTHY J. SAVAGE, J.